

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MARYLAND

3  
4 UNITED STATES OF AMERICA

5 VS.

CRIMINAL NO. AMD-04-029

6 WILLIE MITCHELL, et al.

7 DEFENDANTS

8 Baltimore, Maryland

9 April 26, 2007

10  
11 The above-entitled case came on for a motions  
12 hearing before the Honorable Andre M. Davis, United  
13 States District Judge  
14

15  
16 A P P E A R A N C E S

17 For the Government:

18 Robert R. Harding, Esquire  
19 Michael C. Hanlon, Esquire

20 For Defendant Mitchell:

21 Timothy J. Sullivan, Esquire  
22 Laura Kelsey Rhodes, Esquire

23  
24  
25 Gail A. Simpkins, RPR  
Official Court Reporter

1       For Defendant Martin:

2               Thomas L. Crowe, Esquire  
3               James G. Pyne, Esquire

4       For Defendant Gardner:

5               Barry Coburn, Esquire  
6               Adam H. Kurland, Esquire

7       For Defendant Harris:

8  
9               Gerard P. Martin, Esquire  
10              Joshua R. Treem, Esquire  
11              Brendan A. Hurson, Esquire

P R O C E E D I N G S

THE COURT: We are on the record in United States of America versus defendants, Case Number AMD-04-0029. Counsel are present with their clients, government represented by Mr. Harding and Mr. Hanlon.

This is the first in a series of motions hearings, status conferences that the Court has scheduled in the months leading up to the September trial. The government has helpfully provided a series of road maps on how we might best proceed through this series of proceedings.

It is my hope -- it seems to me the government's proposals make sense, as supplement by the defense. It is my hope that we can accomplish what we want to accomplish in this two-day period with a one-day session and not have to resume tomorrow. But if we resume tomorrow, it would be my hope that we can conclude with just a couple of hours of additional proceedings, so that you can all be excused before lunch tomorrow.

I understand, Mr. Harding, the government has two witnesses it would like to proceed with on one remaining Fourth Amendment issue?

MR. HARDING: Yes. Actually, I have two witnesses, but I told one of them he could go to a

1 meeting and come back at lunchtime. So I was in hopes  
2 the Court would permit me to put him on immediately  
3 following lunch this afternoon.

4 THE COURT: Sure.

5 MR. HARDING: So I have Detective Donald Kramer  
6 here, Your Honor, and I will call him straightaway if  
7 the Court permits it.

8 THE COURT: Okay. Let me hear from counsel on  
9 the other side to see if there are any concerns.

10 DEFENDANT MITCHELL: Mr. Davis, I would like to  
11 address the Court, with permission.

12 THE COURT: All right. Mr. Mitchell, you may  
13 speak.

14 DEFENDANT MITCHELL: I, Willie Edward Mitchell,  
15 III, sentient moral being, would like to rescind my  
16 initial plea of not guilty. I would like to rescind  
17 any controversy I caused, known, unknown. I would  
18 like to rescind my signature for cause. I repented my  
19 debt. I made a mistake. I reserve all rights with  
20 explicit reservations and without prejudice.

21 I will also like the record to reflect I have  
22 accepted Mr. Attorney's, doing business as Tim  
23 Sullivan, offer to be my private lawyer for value and  
24 I have returned his offer to him for value for close  
25 and settlement of the account. As my private

1 attorney, I would like him to perform the following  
2 duties:

3 Do not argue the facts, request the Court to  
4 issue me an appearance bond and waive all public  
5 costs, request the Court to close the account and  
6 release the order of the Court to me immediately,  
7 request the Court to set off and adjust all public  
8 charges by the exemption and in accord with Uniform  
9 Commercial Code 3-419, House Joint Resolution 192,  
10 Public Law 73-10, request immediate discharge.

11 If this attorney is not able to perform his  
12 following duties, I will accept his dishonor.

13 THE COURT: Mr. Mitchell, the only part of what  
14 you just said that I understood is, one, you said you  
15 would like to rescind your plea of not guilty, and I  
16 am not even certain I understand what you mean by  
17 that.

18 The other part that you said that I thought I  
19 understood was you do not want your attorney to argue  
20 the facts. I didn't understand the rest of what you  
21 said.

22 Now let me ask Mr. Sullivan to address what you  
23 just said and see if he has a better understanding,  
24 and I am sure he does, than I do. Then I'll come back  
25 to you to see if you can better explain yourself.

1 Mr. Sullivan, good morning.

2 MR. SULLIVAN: Good morning, Your Honor.

3 THE COURT: By the way, I note that Ms. Rhodes  
4 is not present with us this morning. She will be  
5 arriving a little bit later.

6 MR. SULLIVAN: That's correct.

7 Your Honor, Mr. Mitchell, I met with Mr.  
8 Mitchell last week, and he indicated to me that as  
9 long as I requested and performed the five requests  
10 that he just made to the Court, that I could continue  
11 on as his attorney, he would not be disruptive or  
12 cause problems in court. But in the event that I  
13 could not perform the five requests that he made, I  
14 would be dishonored.

15 I have done, and we have met as a collective  
16 group the defense and discussed these things because  
17 both Mr. Pyne and Mr. Crowe have also received from  
18 their client the same instructions.

19 I have researched Mr. Mitchell's requests and  
20 can't find any cognizable legal basis upon which to  
21 embark upon what he is requesting of counsel.

22 THE COURT: Can you, as best as you can, explain  
23 to the Court what the request is?

24 MR. SULLIVAN: Yes, I can do that, Your Honor,  
25 to the best of my ability.

1           The first request is that I not argue any facts  
2           whatsoever, that I not address the Court, that I not  
3           address any witnesses, that I not cross-examine any  
4           witnesses, that I not do a direct case on behalf of  
5           Mr. Mitchell, that I don't introduce any exhibits,  
6           that I absolutely do nothing during the  
7           guilt/innocence phase of the proceeding, and if he is  
8           convicted of the authorized count, do nothing in terms  
9           of mitigation or defending against the government's  
10          statutory, non-statutory aggravators in the penalty  
11          phase. So I don't do anything.

12          The basis for that is that if I do something,  
13          argue a fact, I will waive Mr. Mitchell's legal  
14          defense and ruin whatever he has created by this  
15          record. I told him that I wasn't inclined to do that,  
16          and we haven't really crossed that Rubicon yet.

17          So the first is I can't argue anything. I can't  
18          do anything, no opening, no jury selection. In fact,  
19          this morning Mr. Mitchell advised me that not  
20          discussing the facts began this morning.

21          The second is --

22          THE COURT: Now the obvious follow-up question,  
23          what is it that he wants or expects you to do if you  
24          are to do noting? Why does he want you in the case?

25          MR. SULLIVAN: I don't know, Your Honor.

1 THE COURT: Okay.

2 MR. SULLIVAN: It's a varying of the earlier  
3 quandary that counsel collectively found ourselves in,  
4 where we're basically left unfettered to defend our  
5 clients, even though they did not want us to represent  
6 them, but would not ask for us to be discharged by the  
7 Court. Now they have made a Faretta request and the  
8 Court hasn't done a Faretta inquiry on the right of  
9 self-representation.

10 I could tell the Court most candidly my position  
11 is that whatever Mr. Mitchell's request is, that I  
12 think I have an obligation ethically to make the  
13 tactical and strategic decision on behalf of my  
14 client, taking into consideration the scope of  
15 representation and how he wants to proceed. This is  
16 not one of the big three, whether to plea or not plea,  
17 whether to testify or not testify, and the like. I  
18 made it absolutely clear to Mr. Mitchell that I won't  
19 honor any of these requests in any penalty phase.

20 So I'm not quite sure, maybe the Court could ask  
21 Mr. Mitchell, I am not quite sure what my role would  
22 be, except for a potted plant. I don't know.

23 THE COURT: All right. So there are four other  
24 items on this list?

25 MR. SULLIVAN: There are four other items, Your



1 Honor. An appearance bond and waiving all public  
2 costs, again, I don't know the basis for that, despite  
3 inquiry.

4 Settling all accounts and releasing an order to  
5 Mr. Mitchell immediately, I don't know the legal basis  
6 for that as well, despite trying to figure out.

7 As to the setoff and adjustment of the public  
8 charges under the Uniform Commercial Code, Section  
9 3-419, House Joint Resolution 192 and Public Law  
10 73-10, I will tell Your Honor that I did research  
11 those three factors and they deal with the federal  
12 reserve, the gold standard and --

13 THE COURT: They have nothing to do with this  
14 case.

15 MR. SULLIVAN: In my opinion, that's correct,  
16 Your Honor.

17 Then a request that the Court release Mr.  
18 Mitchell was the fifth, the fifth request.

19 THE COURT: All right. Is there anything more  
20 you want to say, Mr. Mitchell, on this score?

21 DEFENDANT MITCHELL: Are you making me an offer?

22 THE COURT: No, I'm not making you an offer  
23 whatsoever.

24 DEFENDANT MITCHELL: Are you asking me to do  
25 something with force? Are you using threats, duress

1 and coercion or forcing me to do something for your  
2 benefit?

3 THE COURT: No. I'm asking you is there any  
4 other elaboration or explanation, in light of what you  
5 just heard between the Court and Mr. Sullivan, that  
6 you can offer to explain what it is you are doing?

7 DEFENDANT MITCHELL: I am not here to testify.  
8 I'm here to accept offers and return offers for value.

9 THE COURT: All right. Mr. Mitchell, the Court  
10 is not going to bargain with you. Mr. Sullivan and  
11 Ms. Rhodes represent you. They will represent you as  
12 your attorneys, and that's the way it's going to be.

13 DEFENDANT MITCHELL: I accept your offer for  
14 value. I return your offer to you for value for close  
15 and settlement of the account. I request the  
16 following:

17 I do not argue the fact. I request the Court to  
18 issue me an appearance bond and waive all public  
19 costs, request the Court to close all accounts and  
20 release the order of the Court to me immediately.

21 I request the Court to set off and adjust all  
22 public charges by the exemption, in accord with the  
23 Uniform Commercial Code 3-419, House Joint Resolution  
24 192, Public Law 73-10. I request immediate discharge.

25 THE COURT: All right.

1           DEFENDANT MARTIN: May I address the Court, Mr.  
2           Davis?

3           THE COURT: Yes, Mr. Martin.

4           DEFENDANT MARTIN: Let the record reflect that  
5           I, Shelley Wayne Martin, sentient moral being, rescind  
6           my initial plea of not guilty. I rescind any and all  
7           motions enter on my behalf. I rescind my signature  
8           and cancel any consent for cause. I made a mistake.  
9           I repented my debt. I reserve all my rights with  
10          explicit reservation and without prejudice.

11          THE COURT: Mr. Martin, are you in effect  
12          joining in Mr. Mitchell's position? Is that what you  
13          are doing?

14          DEFENDANT MARTIN: I'm not here to testify. Are  
15          you making me an offer?

16          THE COURT: All right. Mr. Pyne, Mr. Crowe, can  
17          you shed any light beyond what Mr. Sullivan has  
18          already shared?

19          MR. CROWE: I may able to a degree, Your Honor.

20          As Mr. Sullivan indicated, both Mr. Pyne and I  
21          have received papers from our client, two sets of  
22          papers, and each of those instructs us to notify all  
23          parties, including the Judge, the U.S. Attorney,  
24          various court personnel, and the Department of Justice  
25          of his position. I think that being the case, I am at

1 a minimum free to share those papers with the Court,  
2 and I would like to do that at this time.

3 THE COURT: Well, before you do that, can just  
4 summarize your understanding of them?

5 MR. CROWE: Yes, Your Honor. The first request  
6 is not to argue the facts, and my understanding from  
7 the papers and from a brief conversation with my  
8 client today is that he wishes me to do absolutely  
9 nothing. I am not to argue the facts. I am not to  
10 argue the law, which in fact is a matter which he  
11 indicated in the strongest of terms begins today.

12 His second request is to request that the Judge  
13 issue me an appearance bond and waive all public  
14 costs. My assumption was that the appearance bond was  
15 a request that I ask to reopen his detention hearing  
16 and ask that the Court either release him on his  
17 personal recognizance or an unsecured appearance bond.

18 Indeed, we have prepared papers that we would be  
19 willing to file to that effect today, because that's  
20 certainly, if I am interpreting correctly, that's a  
21 proper request.

22 Requests three and four are those which Mr.  
23 Sullivan has recited and it is to request that the  
24 Court close and settle all accounts and release the  
25 order to me immediately. The next request is to

1 request the Court to set off and adjust all public  
2 charges by the exemption, in accordance with the  
3 authorities which Mr. Sullivan mentioned.

4 I would say that the one that I think Mr.  
5 Sullivan didn't discuss was U.C.C. 3-419, which has to  
6 do with accommodation parties for negotiable  
7 instruments and has no possible, in my opinion, no  
8 possible relevance to this case.

9 Then the final matter was to request that the  
10 Court release me.

11 I guess, like Mr. Sullivan, I also feel that if  
12 I have been appointed to represent my client, I simply  
13 can't sit back and not argue the law and not argue the  
14 facts.

15 The client certainly has the right to make the  
16 three decisions Mr. Sullivan mentioned. Both Mr. Pyne  
17 and I, of course, would consult very, very closely  
18 with the client on any other decisions, and I am  
19 generally guided, and I take their wishes even on  
20 tactical decisions very seriously. But it's not a  
21 situation where we can simply sit back and, as Mr.  
22 Sullivan indicated, sit here like potted plants in  
23 this case.

24 I think what the clients may be asking for is  
25 the right to represent themselves. It seems to me

1       that the only way that they can have a situation where  
2       their lawyers don't argue the law and their lawyers  
3       don't argue the facts is if they in fact represent  
4       themselves, either with or without standby counsel.

5               I am not certain that that is what the clients  
6       make, but I think that the request that we have  
7       received today, that Mr. Pyne and I have gotten in  
8       writing and that Mr. Sullivan at least has gotten  
9       orally, would require the Court to initiate a Faretta  
10      inquiry.

11             I know the Court did that to a degree I believe  
12      last November, but I think a full-fledged Faretta  
13      inquiry is appropriate at this time because it appears  
14      that that may be what the clients are asking for.

15             THE COURT: Thank you, Mr. Crowe.

16             I should stand corrected. Defendant Harris is  
17      not present with us, and I will hear from counsel in  
18      just a moment.

19             Yes, Mr. Gardner.

20             DEFENDANT GARDNER: May I speak, sir?

21             THE COURT: Yes.

22             DEFENDANT GARDNER: Let the record reflect that  
23      I, Shawn-Earl Gardner, sentient moral being --

24             THE COURT: I'm sorry. Mr. Crowe, could you  
25      move that microphone down, please?

1           DEFENDANT GARDNER: Let the record reflect that  
2           I, Shawn-Earl Gardner, sentient moral being, rescind  
3           my initial plea of not guilty, also any and all  
4           motions and entered on my behalf, my signature, and  
5           counsel, any consent for cause. I made a mistake. I  
6           repent of my debt. I reserve all rights with explicit  
7           reservation and without prejudice.

8           THE COURT: Thank you, Mr. Gardner.

9           Mr. Coburn, anything to add to what counsel have  
10          already stated for the record?

11          MR. COBURN: No. Thank you, Your Honor. I  
12          don't think we have anything to add to what has  
13          already been stated. I don't think we have any  
14          requests for the Court at this time either.

15          There is one scheduling issue relating to  
16          tomorrow, which at an opportune time I will raise with  
17          the Court. I know that Your Honor may have had a  
18          conversation with Judge Lambert, but that's nothing  
19          that needs to be addressed right now.

20          THE COURT: All right. Thank you, Mr. Coburn.

21          Mr. Treem, Mr. Martin, good morning.

22          MR. TREEM: Good morning, Your Honor.

23          MR. MARTIN: Good morning, Your Honor.

24          MR. TREEM: Your Honor, as you noted, Mr. Harris  
25          is not here. We were advised, Mr. Martin and I and

1 Mr. Hurson, this morning by the marshals that he had  
2 apparently this morning suffered another or had  
3 another epileptic seizure and we are uncertain as to  
4 what his health status is at the moment. We assume he  
5 is getting treated appropriately at Super Max, where  
6 he is being detained, and we have no further  
7 information about either his availability later today  
8 or tomorrow or what the prognosis might be.

9 So we are somewhat in a quandary as to how to  
10 proceed this morning. We are here. We have not had  
11 the opportunity to meet with Mr. Harris beforehand to  
12 discuss with him the proceedings today or what  
13 instructions he might want to give us in terms of how  
14 to proceed.

15 I think we can infer from prior proceedings that  
16 he would join in the statements made by the other  
17 defendants and the positions taken by them, and in  
18 light of that, we, I guess we suffer from somewhat the  
19 same dilemma as the other defense attorneys in terms  
20 of how we can proceed even today.

21 But we cannot tell the Court that we have that  
22 specific instruction, but I think it would be safe for  
23 us to infer and assume that that would be his  
24 instructions to us.

25 THE COURT: Thank you, Mr. Treem.



1           Mr. Mitchell, do you wish to represent yourself  
2 in this case?

3           DEFENDANT MITCHELL: Are you making me an offer?

4           THE COURT: I am asking you whether you wish to  
5 represent yourself.

6           DEFENDANT MITCHELL: Are you giving me legal  
7 advice from the bench?

8           THE COURT: Do you wish to discharge your  
9 attorneys and represent yourself through the balance  
10 of these proceedings?

11           DEFENDANT MITCHELL: I accept your offer for  
12 value. I return your offer to you for value for close  
13 and settlement of the account. I request the  
14 following:

15           I do not argue the facts. I request the Court  
16 to issue an appearance bond, waive all public costs.  
17 I request the Court to close the account and release  
18 the order of Court to me immediately. I request the  
19 Court to set off and adjust all public charges by the  
20 exemption and in accord with the Uniform Commercial  
21 Code 3-419, House Joint Resolution 192, Public Law  
22 73-10. I request immediate discharge.

23           THE COURT: Thank you, Mr. Mitchell.

24           Mr. Martin, do you wish to represent yourself in  
25 this case?

1           DEFENDANT MARTIN: Are you using threats, duress  
2 coercion, force or fear to get me to accept something  
3 for your benefit?

4           THE COURT: I am asking you if you wish to  
5 discharge your attorneys and represent yourself for  
6 the balance of these proceedings?

7           DEFENDANT MARTIN: I accept your offer for  
8 value, return your offer to you for value for settling  
9 and close the account. I do not wish to argue the  
10 facts.

11           I request the Judge to issue me an appearance  
12 bond and waive all public cost, request the Court to  
13 close all accounts and release the order of the Court  
14 to me immediately.

15           I request the Court to set off an adjust all  
16 public charges by exemption, in accord with the  
17 Uniform Commercial Code 3-419, House Joint Resolution  
18 192, and Public Law 73-10, and I request immediate  
19 discharge.

20           THE COURT: Thank you, Mr. Martin.

21           Mr. Gardner, do you wish to represent yourself  
22 in this case?

23           DEFENDANT GARDNER: Are you making me an offer,  
24 sir?

25           THE COURT: I'm asking you whether you wish to

1 discharge your counsel and represent yourself for the  
2 balance of these proceedings.

3 DEFENDANT GARDNER: Are you offering me legal  
4 advice from the bench?

5 THE COURT: Thank you, Mr. Gardner. You may be  
6 seated.

7 Mr. Mitchell, Mr. Martin, Mr. Gardner, your  
8 responses --

9 DEFENDANT GARDNER: I wasn't finished.

10 THE COURT: -- to the Court are no, you do not  
11 wish to represent yourself.

12 DEFENDANT GARDNER: You're not going to let me  
13 finish?

14 THE COURT: So, therefore, your attorneys will  
15 continue to represent you under appointment of the  
16 Court. The question that remains is do you wish to  
17 remain here today through the balance of these  
18 proceedings or do you wish to leave the courtroom?

19 Mr. Mitchell, what is your desire?

20 DEFENDANT MITCHELL: I accept your offer for  
21 value. I return your offer to you for value for close  
22 and settling of the account. I request the following:

23 I do not argue the facts. I request the Court  
24 to release the order of the Court to me immediately.  
25 I request the Court to issue me an appearance bond and

1 waive all public cost. I request the Court to close  
2 all accounts and release the order of the Court to me  
3 immediately. I request the Court to set off and  
4 adjust all public charges by the exemption and in  
5 accord with Uniform Commercial Code 3-419, House Joint  
6 Resolution 192, Public Law 73-10. I request immediate  
7 discharge.

8 THE COURT: All right. Mr. Martin, do you wish  
9 to remain in the courtroom or do you wish to depart  
10 the courtroom?

11 DEFENDANT MARTIN: I accept your offer for  
12 value, return your offer to you for value for settling  
13 and close the account. I do not wish to argue the  
14 facts. I request the Court to issue an appearance  
15 bond and waive all public costs. I request the Court  
16 to close all accounts and release the order of the  
17 Court to me immediately. I request the Court to set  
18 off and adjust all public charges by exemption, in  
19 accord with the Uniform Commercial Code 3-419, House  
20 Joint Resolution 192, and Public Law 73-10, and I  
21 request immediate discharge.

22 THE COURT: Mr. Gardner, do you wish to remain  
23 in the courtroom or do you wish to depart the  
24 courtroom for the remainder of the proceedings?

25 DEFENDANT GARDNER: I accept your offer for

1 value and return your offer to you for value for  
2 closure, for full close and settlement of the account  
3 and request -- I do not wish to argue the facts. I  
4 request that you issue me an appearance bond and waive  
5 all public costs. I request that you close the  
6 account and release the order of the Court to me  
7 immediately.

8 I request you setoff and adjust all public  
9 charges by exemption, in accord with UCC 3-419, House  
10 Joint Resolution 192, and Public Law 73-10, and  
11 request discharge immediately, sir.

12 THE COURT: Thank you, Mr. Gardner.

13 All right. I treat the responses of the  
14 defendants as a yes. They wish to remain here, unless  
15 and until they demonstrate through their behavior that  
16 they wish not to be here.

17 Was it Mr. Kramer that you have available now,  
18 Mr. Harding?

19 MR. HARDING: Yes, Your Honor.

20 THE COURT: All right. We will proceed with the  
21 suppression hearing with respect to Mr. Mitchell's  
22 arrest on April 1, 2002. You may call the witness.

23 MR. TREEM: Your Honor, before Mr. Harding does  
24 that, may I be heard for one moment?

25 THE COURT: Yes, Mr. Treem.

1 MR. TREEM: Your Honor, as I said, we are  
2 somewhat at a loss as to what our role should be here  
3 today, and we would request that unless and until Mr.  
4 Harris has had the opportunity to respond to the  
5 Faretta inquiry that the Court has just engaged in  
6 with other defendants, that Mr. Harris and us, as his  
7 lawyers, not be, not participate in the remainder of  
8 these hearings and that Mr. Martin and Mr. Hurson and  
9 I be excused.

10 THE COURT: I certainly understand the request,  
11 Mr. Treem, and don't find it unreasonable, but the  
12 request is denied. As we all know, while a defendant  
13 has the right to be present for all proceedings, the  
14 right to be present for legal argument is more limited  
15 than relevant factual development and factual  
16 evidentiary-type hearings.

17 I don't intend to have an evidentiary hearing  
18 today with respect to Mr. Harris. You and Mr. Hurson  
19 and Mr. Martin are fully capable of presenting your  
20 legal arguments that we will focus on today on behalf  
21 of Mr. Harris.

22 I think that your earlier comments are well  
23 taken. The Court has every reason to believe that Mr.  
24 Harris's responses to the Court will echo those of the  
25 other defendants, and the Court's determination as to

1 Mr. Harris will be exactly the same as the Court's  
2 determination as to the remaining three defendants.

3 So, counsel, remain fully engaged in the case.  
4 Counsel will continue to advocate on behalf of your  
5 clients with the vigor that is customary in your  
6 professional lives, and we will proceed in that  
7 fashion.

8 MR. TREEM: Might I inquire, Your Honor, what  
9 would be the Court's intention in terms of conducting  
10 an appropriate Faretta inquiry with regard to Mr.  
11 Harris so at least we can advise him as to what the  
12 Court's intentions are?

13 THE COURT: As soon as he is available either  
14 tomorrow or perhaps later this afternoon, if he can be  
15 brought over, which I don't assume he will be, but  
16 perhaps he will. But as soon as he is next in court,  
17 the Court will certainly undertake a Faretta inquiry  
18 of Mr. Harris.

19 MR. TREEM: To the extent, therefore, Your  
20 Honor, that on the chance that he does decide to  
21 discharge us as counsel, that he not be prejudiced by  
22 any arguments that we might make since his intention  
23 would have been to discharge us today had he been  
24 here.

25 THE COURT: I don't believe that would be his

1 intention, but I certainly don't perceive any  
2 possibility of prejudice to Mr. Harris from any  
3 arguments you might make on his behalf.

4 To the extent that Mr. Harris or any defendant  
5 truly wishes not to contest the facts of the case,  
6 your argument on his behalf on legal issues, such as  
7 severance, dismissal of the indictment and such, can't  
8 possibly prejudice his desire if it is his desire in  
9 effect to stand mute.

10 MR. TREEM: Well, Your Honor, in that regard, I  
11 suspect that there is a very real possibility,  
12 especially with regard to the severance issues, that  
13 there may be representations of what the factual  
14 development might be both in the guilt/innocence phase  
15 and in the sentencing phase, which would directly  
16 implicate Mr. Harris and his relationship to the other  
17 defendants, which he may not wish us to disclose.

18 THE COURT: Except at this point you represent  
19 him.

20 MR. TREEM: Very well, Your Honor. Therefore,  
21 my request at least that should he decide that he does  
22 wish to discharge us and had he been here today, he  
23 would have done so, that he not be bound by whatever  
24 representations we might make on his behalf in that  
25 regard.



1           THE COURT: I appreciate it, Mr. Treem. Even  
2           were he present and even were he to tell the Court  
3           that he wished to discharge counsel, as the  
4           government's memorandum quite accurately points out,  
5           there is no strong reason to believe that the Court  
6           would grant that request.

7           MR. TREEM: Well, I would like --

8           THE COURT: There is in fact very strong reason  
9           to believe that the Court would deny the request. I'  
10          not saying I will deny it. I'm not saying I'll grant  
11          it. I don't know what I'll do if the request is ever  
12          made.

13          But I'm satisfied that on the present record,  
14          under the present circumstances, it is entirely  
15          consistent with Mr. Harris's due process rights to a  
16          fair proceeding to have you and co-counsel continue to  
17          represent him.

18          MR. TREEM: Very well, Your Honor.

19          THE COURT: Thank you.

20          MR. SULLIVAN: Before we call Mr. Kramer, can I  
21          just address one other thing?

22          THE COURT: Yes, Mr. Sullivan.

23          MR. SULLIVAN: To complete the Court's inquiry  
24          on the interpretation issue, I understand the Court's  
25          ruling and certainly Ms. Rhodes and I, and probably

1 all counsel, will continue to zealously and  
2 effectively represent our clients. But there is an  
3 ethical issue here that I think the Court needs to  
4 give us some guidance on.

5 So the Court has defaulted to the constitutional  
6 issue that because there is an ambiguous or no  
7 response, that we are still their attorneys, that they  
8 have not invoked sufficiently their right to  
9 self-representation.

10 THE COURT: I'm sorry to interrupt. Let me be  
11 clear. It was not an ambiguous response.

12 MR. SULLIVAN: Okay.

13 THE COURT: The response was no, I don't want  
14 self-representation.

15 MR. SULLIVAN: That's fine. It's the same  
16 thing.

17 Your Honor, that leaves us with Rule, Model Rule  
18 1.2, for those lawyers who are licensed in Maryland,  
19 which are incorporated by this Court's Local Rules.  
20 That rule says that a lawyer shall abide by a client's  
21 decision concerning the objectives of the  
22 representation and, when appropriate, shall consult  
23 with the client as of means by which they are to be  
24 pursued.

25 Now what has happened now before today, they

1 didn't want us, but they didn't want us fired. So we  
2 were unfettered to continue our preparations, continue  
3 developing for the trial, both phases if we get there.

4 But now Mr. Mitchell has done this factor one,  
5 no arguments, no facts. It's going to come to a head  
6 as soon as Mr. Harding finishes his direct examination  
7 of the detective, and I'm with a quandary to recognize  
8 and abide by Mr. Mitchell's --

9 THE COURT: Excuse me. The record will reflect  
10 that Ms. Rhodes has arrived. Good morning, Ms.  
11 Rhodes.

12 MS. RHODES: Good morning.

13 THE COURT: Sorry, Mr. Sullivan. Go ahead.

14 MR. SULLIVAN: That's quite all right.

15 To abide by the scope of representation that Mr.  
16 Mitchell has instructed me. Your Honor, I fear that  
17 unless the Court directs us that your scope of Mr.  
18 Mitchell shall be unfettered, that, you know, at some  
19 point in time Mr. Hirshman will be asking me, you had  
20 a client who wanted to go down a specific path. He  
21 wanted his defense to be in a specific way and you  
22 ignored him essentially.

23 So I'm just looking for the Court --

24 THE COURT: Of course, Mr. Sullivan, I will take  
25 every phone call placed to you by Mr. Hirshman, and

1       that's true for each of the counsel here.

2               MR. SULLIVAN: Thank you.

3               THE COURT: I invite you to put call forwarding  
4       on your phone and any call any counsel in this case  
5       should receive from the Attorney Grievance Commission  
6       Office should come directly to my office.

7               MR. SULLIVAN: Thank you.

8               THE COURT: But to be clear, and perhaps less  
9       whimsical, I am indeed directing counsel, as officers  
10      of the court, as appointed counsel under the Criminal  
11      Justice Act, to continue your representation  
12      vigorously and zealously on behalf of your respective  
13      clients and to continue to make the customary tactical  
14      and strategic decisions that tradition assigns to the  
15      role of counsel in a criminal case.

16              The Court obviously has an independent  
17      responsibility under the Sixth Amendment to insure  
18      that each defendant, no matter what his desire,  
19      receives a fair trial and a fair and impartial  
20      adjudication of the facts. So the Court has no  
21      hesitation whatsoever in its conclusion expressed to  
22      counsel that the proceedings will go forward in the  
23      customary way.

24              As I said, the defendant will either be present  
25      or not, at their election.

1 Mr. Harding, you may call your witness.

2 MR. HARDING: Thank you.

3 THE CLERK: Raise your right hand.

4 DONALD KRAMER

5 a witness called on behalf of the Government, having  
6 been previously duly sworn, was examined and testified  
7 as follows:

8 THE CLERK: Be seated.

9 For the record, state your name and spell it for  
10 the record, please.

11 THE WITNESS: Sergeant Donald Kramer. Last name  
12 K R A M E R, Baltimore City Police Department.

13 DIRECT EXAMINATION

14 BY MR. HARDING:

15 Q Good morning, Sergeant Kramer.

16 A Good morning.

17 Q Can you tell us, sir, what is your assignment  
18 with the Baltimore City Police Department right now?

19 A Narcotics division.

20 Q Okay. Is that in some particular precinct or --

21 A Northern district.

22 Q Can you tell us -- well, tell us how long you  
23 have been a Baltimore City Police Department.

24 A 18 years.

25 Q Can you tell us what your assignment was back in

1 April, the early part of April of 2002?

2 A I was assigned to the Baltimore City Homicide  
3 Division and I was working with the Drug Enforcement  
4 Administration, the Red Run Group.

5 Q So were you on a long-term detail to the Red Run  
6 Group at DEA?

7 A Yes, sir. I was there approximately three  
8 years.

9 Q Do you recall, were you involved in an arrest on  
10 April 1, 2002?

11 A Yes, sir.

12 Q Can you tell us the name of the person who you  
13 arrested or participated in arresting?

14 A Willie Mitchell.

15 Q Can you tell us, were you involved in the  
16 investigation of Mr. Mitchell prior to that day or did  
17 you simply become involved at the time of the arrest?

18 A I became involved on that date for enforcement  
19 purposes.

20 MR. SULLIVAN: I'm sorry. For what purposes?

21 THE WITNESS: Enforcement purposes, to place him  
22 under arrest.

23 MR. SULLIVAN: Thank you.

24 BY MR. HARDING:

25 Q Did you have an understanding with your fellow

1       officers, Sergeant Kramer, and the other agents in Red  
2       Run about whether you would interview Mr. Mitchell?

3       A       We had an agreement that we would not.

4       Q       Can you tell us what you did agree to, what you  
5       were intending to do?

6       A       Simply place him under arrest.

7       Q       What were your arresting him for?

8       A       Outstanding warrant, at least one outstanding  
9       warrant of violence.

10      Q       Okay. Were you the one that made the decision  
11      that you and your fellow officers and agents were not  
12      going to interview Mr. Mitchell that day?

13      A       I did not make that decision.

14      Q       Okay. Do you remember who did or do you --

15      A       There came a time I received that information  
16      before arresting him, but I don't recall from whom.

17      Q       Were you on foot or in a vehicle that day?

18      A       I was in a vehicle.

19      Q       Was it an unmarked vehicle or a marked patrol  
20      car?

21      A       It was an unmarked minivan.

22      Q       Were you in plainclothes or in uniform that day?

23      A       I was in plainclothes.

24      Q       Can you tell us, were you alone in the vehicle  
25      or were you with other people?

1 A There were two others in my vehicle. I was  
2 driving. Detective Keith Benson, who was my partner  
3 at the time, was with me, and sometime before  
4 arresting Mr. Mitchell, there was a Baltimore County  
5 detective placed in the van with me for communication  
6 purposes.

7 Q I see. Were you positioned in Baltimore County  
8 at this time?

9 A Yes, sir. There came a time when we received  
10 information that he may be at his girlfriend's place  
11 of work.

12 Q I see. Can you tell us where that was?

13 A That was in the vicinity of Owings Mills Mall  
14 near Red Run Boulevard.

15 Q Do you recall the name of the Baltimore County  
16 detective who was in your vehicle with you?

17 A I do not.

18 Q You said he was present in the vehicle for  
19 communication purposes. Can you explain what you mean  
20 by that?

21 A Being a Baltimore City detective at the time, I  
22 had communications with Baltimore City KGA or  
23 communications, but I, myself, or Keith Benson did not  
24 have communications with Baltimore County. So at some  
25 point in time, someone made the decision to place a



1 Baltimore County detective in the van with myself and  
2 Detective Benson so we could communicate with  
3 Baltimore County if in fact we had to, because we were  
4 in the county. We were not in the city.

5 Q Was your vehicle the only one deployed at Red  
6 Run Boulevard near Owings Mills Mall?

7 A I believe there were others, but I can't be sure  
8 who or where they were.

9 Q Well, were there other vehicles at other  
10 locations?

11 A Absolutely.

12 Q Were you within -- could you see other vehicles  
13 from where you were?

14 A I don't recall.

15 Q Did there come a time when you started to follow  
16 a certain vehicle that afternoon?

17 A There came a time we received information that  
18 Willie Mitchell was a passenger in a small dark color  
19 sedan and that his girlfriend was driving the vehicle.

20 Q Do you recall the means by which you learned  
21 that information?

22 A No, I do not.

23 Q What did you do when you got that information?

24 A We started following the vehicle.

25 Q Do you recall, was it by radio that you got this

1 information or was it by some --

2 A I believe it was by radio communications, but I  
3 don't know who actually told us that.

4 Q Were you driving the vehicle that day or were  
5 you a passenger?

6 A I was driving.

7 Q Did there come a time when someone in your  
8 vehicle made a radio transmission to other people in  
9 the police department?

10 A I remember telling Baltimore County -- myself or  
11 Detective Benson, I don't recall who, told the  
12 Baltimore County detective that we would need a marked  
13 patrol car to stop the vehicle, because we did not  
14 have emergency equipment on the minivan.

15 Q Could you see who was in the vehicle at the time  
16 from your van?

17 A I could see there were two occupants.

18 Q Okay. So what happened after this radio  
19 transmission was made about a marked patrol car? What  
20 happened?

21 A We were on Reisterstown Road, headings towards  
22 Baltimore City -- we were still in Baltimore County --  
23 when a Baltimore County police cruiser pulled up  
24 behind the vehicle, the suspect vehicle, and in front  
25 of me.

1           That Baltimore County cruiser activated its  
2           emergency lights. The vehicle did pull over in front  
3           of an Exxon on Reisterstown Road.

4           At that time I placed -- I drove the minivan to  
5           the passenger side, basically taking up a tactical  
6           position in case Mr. Mitchell was to flee or try to do  
7           something else.

8           Q        Okay. What happened next?

9           A        I exited my vehicle. He got out. He did not  
10          give any resistance.

11          Q        You're talking about Mr. Mitchell?

12          A        Mr. Mitchell that is.

13          Q        Okay.

14          A        He placed his hands in the air as I requested.  
15          I did a pat down of his person and found a loaded nine  
16          millimeter handgun in his ankle area, in his boot or  
17          sock.

18          Q        Did you notice anything unusual about Mr.  
19          Mitchell that day?

20          A        He was a bit jittery. I thought he was nervous.  
21          He smelled strongly of alcohol, and there was a bottle  
22          of alcohol on the floor of the vehicle where he was  
23          sitting.

24          Q        Okay. Did Mr. Mitchell say anything when you  
25          arrested him?

1 A He did not.

2 Q How much time passed before Mr. Mitchell was  
3 transported away from the scene on Reisterstown Road?

4 A Maybe a minute went by.

5 MR. SULLIVAN: Objection to maybe.

6 THE COURT: Overruled. Go head, officer, or  
7 detective.

8 THE WITNESS: Approximately a minute went by and  
9 he was placed into a Baltimore County prisoner  
10 transport vehicle, a patrol car with a cage in the  
11 back.

12 BY MR. HARDING:

13 Q And what did you do during that minute or so  
14 before he was transported away?

15 A I did a search of his vehicle for any more  
16 weapons. Basically I held onto him, and then I did a  
17 search of the vehicle after he was taken from me.

18 Q Were there other officers on the scene by that  
19 time? I guess there were the uniformed officers, but  
20 were there any other officers?

21 A One or two uniformed officers, myself, Detective  
22 Benson, and the Baltimore County detective at least.

23 Q Did you ever talk to Willie Mitchell that day?

24 A I did not.

25 Q Did you give him Miranda warnings?

1 A The only thing I said to him was I gave him  
2 orders to step out of the vehicle and place his hands  
3 up.

4 Q So you did or did not give him Miranda warnings?

5 A I did not give him Miranda.

6 Q Did you see or hear anyone give him Miranda  
7 warnings that day?

8 A I did not.

9 Q What did you do after he was cuffed and put in  
10 this patrol car?

11 A At that time, he wasn't my responsibility. He  
12 was in the custody of the officer operating that  
13 vehicle.

14 Q What did you do?

15 A I responded to Valdivia Court, I believe it  
16 is -- I may be mistaken on the name -- to conduct the  
17 search warrant at his girlfriend's apartment with  
18 other detectives in the Red Run Group.

19 Q I see. Did you have any more contact with  
20 Willie Mitchell that day?

21 A I did not.

22 MR. HARDING: Thank you. I have no further  
23 questions, Your Honor.

24 DEFENDANT MITCHELL: I fully accept the  
25 government's offer for value. I return the offer to

1 him for value for close and settlement of the account.

2 I request the following:

3 I do not argue the facts, request the Court to  
4 issue me an appearance bond and waive all public cost.

5 I request the Court to close all accounts and  
6 release the order of the Court to me immediately. I  
7 request the Court to set off and adjust all public  
8 charges by the exemption, in accord with Uniform  
9 Commercial Code 3-419, House Joint Resolution 192,  
10 Public Law 73-10. I request immediate discharge.

11 THE COURT: I am not going to permit repeated  
12 disruptions, Mr. Mitchell.

13 You may proceed, Mr. Sullivan.

14 MR. SULLIVAN: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. SULLIVAN:

17 Q Good morning, sergeant.

18 A Good morning.

19 Q Did you bring any reports that you prepared  
20 about this April 1, 2002 arrest of Mr. Mitchell,  
21 because I don't see any up there?

22 A Because I didn't bring any.

23 Q Okay. Just so I understand, there are no  
24 reports by you of what you just testified to?

25 A Correct.

1 Q Are there reports about who you arrested on  
2 March 30th of 2002.

3 A I believe there is.

4 Q Who did you arrest on March 30th of 2002?

5 A Willie Mitchell.

6 Q I thought he was April 1, 2002.

7 A My mistake.

8 Q Well, when you arrested people -- let's pick a  
9 date, any date.

10 March 1, 2002, who did you arrest that day?

11 A I don't recall.

12 Q That's why you keep reports, right?

13 A We keep reports to keep accurate dates on file.

14 Q And also sergeant -- you have been a detective,  
15 what? You've been a police officer 18 years, right?

16 A That's correct?

17 Q So you know, detective, do you not, that one of  
18 the reasons that you keep reports is when you are  
19 called to testify against a person that you arrested,  
20 you can refresh your recollection and remember what  
21 happened, right?

22 A I did not make any reports that day.

23 Q I understand that. But the answer to my  
24 question is that's one of the reasons why you keep  
25 reports, correct?

1 A We do keep reports for those purposes. I did  
2 not record that on that date.

3 Q Just so I understand, on this day you were  
4 working Red Run with the DEA, right?

5 A Yes, sir.

6 Q You know, of course, what a DEA-6 is, don't you?

7 A Yes, sir.

8 Q What is that?

9 A It's an administrative report.

10 Q Or a report of investigation, right? Something  
11 you had done that day, right?

12 A Yes, sir.

13 Q In your official law enforcement capacity,  
14 correct?

15 A Yes, sir.

16 Q Are you telling me, just so I understand this,  
17 that you are telling Judge Davis today there is not a  
18 single report penned by you about what you just  
19 testified to?

20 A That's correct.

21 Q Now, on April 26, 2007, you are just testifying  
22 from your recall of your April 1, not March 30th, your  
23 April 1, 2002 arrest of Mr. Mitchell?

24 A I am going from my memory recall and  
25 administrative report that was authored by someone



1       else.

2       Q       What report was that?

3       A       That was a report authored by Detective Giganti.

4       THE COURT: I'm sorry?

5       Q       Detective who?

6       A       Detective Giganti. I'm sorry.

7       Q       Could you spell that?

8       A       G I G A N T I, I believe.

9       Q       Who is this person?

10      A       He is a detective with the City police  
11      department.

12      Q       Homicide or narcotics?

13      A       He was in homicide at that time.

14      Q       And when did you look at this report?

15      A       About a month ago.

16      Q       Did it refresh your recollection?

17      A       It did.

18      Q       Okay. Before you looked at it, did you have no  
19      recollection of this?

20      A       I had -- yes, I did have some recollection, but  
21      it was five years ago.

22      Q       Do you have --

23              MR. SULLIVAN: Let me ask the government.

24      Court's indulgence.

25              (Pause.)

1 Q Now help me out with something else, sergeant.

2 When a task force that you were a member of is going  
3 to arrest somebody who had outstanding warrants, law  
4 enforcement does some kind of planning, right?

5 A Yes.

6 Q You just don't go out into the neighborhood and  
7 hope that you run into the person. You have a meeting  
8 and you discuss an action plan or an execution plan or  
9 whatever you guys call it, right?

10 A Not necessarily all of that or in that order.  
11 No, sir.

12 Q Well, on April 1, 2002, could you tell us who  
13 was at the meeting to discuss the arrest of Mr.  
14 Mitchell?

15 A I don't recall a meeting per se. I do remember  
16 receiving information, as I was working on other cases  
17 myself, that there was an outstanding warrant for  
18 Willie Mitchell. I don't know exactly where I was or  
19 who gave me that information at that time, but I did  
20 meet up with other investigators, both county and  
21 city, to safely arrest him on at least one open  
22 warrant.

23 Q Well, who is the person, detective or sergeant,  
24 who told you don't question Mr. Mitchell?

25 A I don't recall.

1 Q Well, who was there?

2 A Who was there, who was working with me that day?

3 Q Who --

4 A Who was part of the operation?

5 Q That wasn't a good question. Let me ask it this  
6 way.

7 Who told you not to ask Mr. Mitchell any  
8 questions?

9 A I don't recall.

10 Q Well, who was involved with you in executing the  
11 arrest warrant on Mr. Mitchell?

12 A Several detectives, both city and county.

13 Q And they have names?

14 A I can recall some of their names.

15 Q Sure. That's what I would like.

16 A Sergeant James Hagin, Detective Chris Graul,  
17 Detective Keith Benson, Detective Giganti.

18 Q Which one of these, sergeant, told you whatever  
19 you do, don't ask Mr. Mitchell any questions?

20 A I don't recall. I don't know if it was told to  
21 me like that.

22 Q Well, how was it told to you?

23 A I don't recall.

24 Q Well, didn't you just --

25 You remember Mr. Harding asking you some

1 questions about ten minutes ago, right?

2 A Yes, I do.

3 Q And didn't you answer to him, sergeant, that you  
4 were simply to arrest him and not ask him any  
5 questions, do not interview him?

6 A I do remember that, yes.

7 Q Who told you that?

8 A I don't recall.

9 Q How many members of the arrest team were there?

10 A I don't know.

11 Q Just so I understand this, your actual contact  
12 with Mr. Mitchell lasted approximately one minute,  
13 right, your actual physical contact?

14 A Approximately, yes, sir.

15 Q Right. If I understand your testimony, you  
16 drove your minivan up to the passenger side once the  
17 county cruiser effectuated the traffic stop, got Mr.  
18 Mitchell out of his vehicle, patted him down, and then  
19 turned him over to a county police officer, correct?

20 A Yes, sir.

21 Q The only thing you said to Mr. Mitchell was I  
22 guess put your hands up?

23 A I asked him to get out of the car and place his  
24 hands where I could see them in the air.

25 Q And your demeanor and tone was just like you're

1       testifying today?

2       A       Probably not.

3       Q       And you probably had your service weapon drawn  
4       on him, correct?

5       A       Correct.

6       Q       And other officers probably had their service  
7       weapons drawn too, correct?

8       A       I know that I did. I don't know what they were  
9       doing.

10      Q       Right.

11      A       My focus was on Mr. Mitchell.

12      Q       Right. So you drew your weapon, got Mr.  
13      Mitchell out, told him to put his hands up, patted him  
14      down, gave him to a county officer, and that ended  
15      your involvement, correct?

16      A       That is correct.

17      Q       Now would it be a fair statement, sergeant, that  
18      you might have been a part of the Red Run Task Force,  
19      but that this was not your case?

20      A       That's correct?

21      Q       And while you were busy working other cases,  
22      somebody called for your assistance on this occasion  
23      in April of 2002, correct?

24      A       That's correct.

25      Q       Who was that person who called for your

1 assistance?

2 A I don't recall.

3 MR. SULLIVAN: Thank you.

4 DEFENDANT MITCHELL: Your Honor, Your Honor.

5 THE COURT: Thank you. Anything further, Mr.  
6 Harding?

7 MR. HARDING: No, Your Honor.

8 DEFENDANT MITCHELL: Your Honor.

9 MR. COBURN: I have some questions, Your Honor,  
10 if I may?

11 THE COURT: All right, Mr. Coburn.

12 DEFENDANT MITCHELL: May I speak?

13 THE COURT: No, Mr. Mitchell.

14 DEFENDANT MITCHELL: I accept your offer. I  
15 reserve all rights with explicit reservation and  
16 without prejudice.

17 THE COURT: Go ahead, Mr. Coburn.

18 MR. COBURN: Thank you so much, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. COBURN:

21 Q Good morning, Sergeant Kramer.

22 A Good morning, sir.

23 Q You are an employee of the Baltimore City Police  
24 Department; is that correct?

25 A Yes, sir.

1 Q And you were so employed back in April of 2002;  
2 is that correct?

3 A I was.

4 Q You were working as part of what you referred to  
5 as the Red Run -- that's R E D R U N -- Task Force; is  
6 that right?

7 A Yes, sir.

8 Q But your assignment within the Baltimore City  
9 Police Department was, did you say it was in the  
10 Homicide Division?

11 A Correct.

12 Q You testified I believe in response to some  
13 questions that I think were both from Mr. Harding and  
14 from Mr. Sullivan that you were in an unmarked minivan  
15 at the time the stop of Mr. Mitchell's vehicle was  
16 effected; is that right?

17 A That's correct.

18 Q The minivan was on Reisterstown Road; is that  
19 correct?

20 A As I remember, yes, sir.

21 Q Mr. Mitchell's vehicle was also on Reisterstown  
22 Road; is that correct?

23 A I don't know if it was actually his vehicle or  
24 not.

25 Q No. I didn't mean his vehicle.

1 A The vehicle he was in.

2 Q I withdraw the question.

3 The vehicle in which he was a passenger was also  
4 on Reisterstown Road at the time the stop was  
5 effected; is that right?

6 A Yes, sir.

7 Q Now this particular location on Reisterstown  
8 Road is in Baltimore County; is that right?

9 A It is.

10 Q It's not part of Baltimore City; is that right?

11 A That's correct.

12 Q You testified, did you not, in response to one  
13 of Mr. Sullivan's questions, and again, I think also  
14 in response to Mr. Harding, that it was you who, after  
15 the vehicle was stopped, ordered Mr. Mitchell out; is  
16 that correct?

17 A Yes, sir.

18 Q I believe your words were you ordered him to get  
19 out of the vehicle and put his hands where you could  
20 see them; is that right?

21 A Correct.

22 Q And you indicated in response to Mr. Sullivan  
23 that you had your service weapon drawn and pointed in  
24 his direction at the time; is that right?

25 A Yes, sir.



1 THE COURT: I'm sorry. Mr. Coburn, where are we  
2 going?

3 MR. COBURN: I have no further questions, Your  
4 Honor.

5 THE COURT: Okay. Good.

6 Anything else, Mr. Harding?

7 MR. HARDING: No, Your Honor.

8 THE COURT: Thank you very much, Detective  
9 Kramer.

10 All right. We had a number of legal issues I  
11 think counsel may or may not want to be heard on. Let  
12 me start with this whole issue of mental health.  
13 Where do we stand on those issues, counsel? Mr.  
14 Harding?

15 MR. HARDING: Your Honor, the government  
16 submitted a proposed order for discovery on mental  
17 health issues many months ago. We request that the  
18 Court -- we also submitted modeled proposed orders  
19 that were issued in similar capital cases recently in  
20 this district.

21 So the government requests that the Court issue  
22 a discovery order on mental health issues. I guess  
23 the complication here is that we don't know how much  
24 mental health evidence there is going to be or exactly  
25 how to schedule when it appears that there isn't going

1 to be an opportunity to conduct, for example,  
2 psychiatric or psychological examinations of these  
3 defendants. But I think we have to proceed somehow  
4 because we are getting within five months or so now, a  
5 little over five months before the trial.

6 So the government requests that the Court enter  
7 a scheduling order on mental health issues.

8 THE COURT: Let me start with Mr. Sullivan or  
9 Ms. Rhodes if there is anything to be said on that.

10 MR. SULLIVAN: Only, Your Honor, that 12.2 sets  
11 forth the procedure for the Court and parties to  
12 consider. I think Mr. Harding is right, that it might  
13 be much ado about nothing because whether we have it  
14 done now or not done before Mr. Mitchell elected to  
15 proceed like he did, it's not ripe until such time as  
16 we make a declaration that we are going to do it.

17 Now if we did it, we have to give the government  
18 notice of that, but I wouldn't object to the Court  
19 placing an order into effect.

20 THE COURT: Thank you, Mr. Sullivan.

21 Mr. Crowe, Mr. Pyne?

22 MR. CROWE: Your Honor, we are in a somewhat  
23 different position because the government is not  
24 seeking to execute our client. At this point we don't  
25 know of any likely mental health defense.

1 THE COURT: All right.

2 MR. CROWE: But we certainly wouldn't object to  
3 the entry of an order.

4 THE COURT: Thank you.

5 Mr. Coburn.

6 MR. COBURN: Thank you, Your Honor. Your Honor,  
7 I think the inquiry that Mr. Harding just made was  
8 directed mainly at us.

9 There has been some pretty extensive briefing  
10 about this already that's in the file. The government  
11 filed a motion with respect to disclosure. We filed  
12 at least a couple of responses. I guess we have no  
13 objection to Your Honor resolving that on the papers  
14 after reviewing the motion and responses that have  
15 been propounded on this.

16 There is, I mean there is an issue about it or a  
17 couple of issues procedurally in terms of just sort of  
18 when this has to happen and, you know, when any sort  
19 of preclusive effect of non-disclosure might take  
20 effect, that sort of thing.

21 I should tell Your Honor that we've actually  
22 already made an initial Rule 12.2 disclosure in this  
23 case. In fact, I think we've made several of them.  
24 But our suggestion to the Court is just that Your  
25 Honor review the paperwork and rule on the papers.

1 THE COURT: All right. I intend to enter the  
2 government's proposed order.

3 MR. COBURN: Your Honor knows, we do object to  
4 it.

5 THE COURT: I understand.

6 MR. COBURN: Okay.

7 THE COURT: All right. Mr. Treem.

8 DEFENDANT GARDNER: Can I speak, sir?

9 THE COURT: No, Mr. Gardner. Thank you.

10 DEFENDANT GARDNER: I would like to reserve my  
11 rights with explicit reservation and without  
12 prejudice.

13 THE COURT: It's reserved.

14 MR. TREEM: Your Honor, we, as the Court knows,  
15 we are just now getting the budget approved, and so  
16 Mr. Martin and I have not even had the opportunity to  
17 discuss the possibility of mental health issues with  
18 regard to Mr. Harris with any potential experts or  
19 otherwise discuss it even with him. So we are not in  
20 a position to put anyone on notice just yet.

21 But having said that, I think it is obvious from  
22 at least today's events and from other events that,  
23 other seizures that Mr. Harris has had which are known  
24 because they occurred while he was in custody, that  
25 there may well, very well be the likelihood of some

1 historical mental health evidence with respect to his  
2 conditions. Whether that amounts to a defense or not,  
3 we don't know at this point, but I think it would be  
4 -- it's certainly likely that there would be some  
5 historical testimony about all of this.

6 THE COURT: All right. Thank you, Mr. Treem.

7 Well, the Court certainly is going to be as  
8 accommodating as it possibly can be under the  
9 circumstances, with the efforts by counsel to produce  
10 what is required under the rules. But as I have said  
11 before on the record, it's not an open-ended pathway,  
12 and there is a risk that the defendants could forfeit  
13 their opportunities to adduce such evidence if good  
14 faith isn't shown. I will leave it at that.

15 All right. Why don't we move to issues of  
16 discovery, if there are any remaining. Mr. Sullivan.

17 MR. SULLIVAN: Your Honor, I don't believe we  
18 have any outstanding discovery-related pleadings.

19 THE COURT: All right. Mr. Crowe.

20 MR. CROWE: Your Honor, on behalf of Mr. Martin,  
21 I believe we have a number of discovery issues which  
22 are open.

23 We have filed an initial motion for a Bill of  
24 Particulars, I believe sometime in 2005.

25 Subsequently, when the third superseding

1 indictment came down last November, we asked for a  
2 more limited Bill of Particulars because we felt at  
3 that time it was going to be necessary to get a little  
4 additional information to understand the third  
5 superseding indictment and its extension of the  
6 conspiracy through August of 2006, and the other  
7 allegations that were in there as well.

8 Just to review for the Court, in terms of our  
9 initial motion, we asked for what I think is pretty  
10 standard stuff, the names and other identification  
11 information of co-conspirators and aiders and  
12 abettors, the roles which were played by any unnamed  
13 conspirator and aider and abetter.

14 THE COURT: Mr. Crowe, it would be helpful if  
15 you could just tell me what you don't presently have  
16 that you believe you are entitled to.

17 MR. CROWE: Your Honor, I don't think I have  
18 ever been in a case where I received so much paper and  
19 I really know so little.

20 I do not know -- although my client is charged  
21 with two murders, those being the murders of the two  
22 Wyche brothers, I don't know whether they are claiming  
23 that my client was an individual who was present at  
24 the scene, whether the government is claiming that he  
25 is the person who actually pulled the trigger and

1 fired a bullet, whether he was an aider and abettor in  
2 some other, whether he was an aider and abettor in  
3 some other situation.

4 In addition to that, the --

5 THE COURT: Well, I'm sorry. What do you know?

6 MR. CROWE: I know very, very little. I know  
7 that there is no physical evidence in terms of the  
8 fingerprints or forensic evidence that connects him to  
9 the crime.

10 I am informed that some individuals have  
11 apparently identified his voice on a tape which the  
12 government alleges was made shortly after the murder.

13 So just to bring it down to, I mean to  
14 particulars, the government asserts that after the  
15 murder was committed, individuals were riding in a  
16 car. One of the items they had with them was a cell  
17 phone, which was seized from one the of Wyche  
18 brothers. They began talking, and somebody apparently  
19 pushed a button which caused the conversation to be  
20 sent into the voice mail.

21 THE COURT: Right. Yeah, I understand all of  
22 that. But from what you are saying, it sounds like  
23 you are saying you received no reports, no autopsies,  
24 no, you haven't received anything on this, and  
25 that's --

1 MR. CROWE: No. We've certainly gotten that. I  
2 mean I understand that people died, that people were  
3 arrested. But in terms of what it is alleged that my  
4 client has done, I have no idea what that is about.

5 Perhaps equally important, we were told that  
6 there were apparently all of these co-conspirators and  
7 aiders and abettors and that in the RICO enterprise,  
8 there were people who weren't members, but they were  
9 associates and they were in some fashion involved, in  
10 some fashion involved in either the RICO conspiracy,  
11 the drug conspiracy or the RICO enterprise. We  
12 certainly don't know that.

13 We asked, for example, for the names of the  
14 individuals who physically committed each murder.  
15 That doesn't seem to be anything which is particularly  
16 revolution-like, and we asked --

17 THE COURT: When you say physically committed  
18 each murder, you mean you want to know the identity of  
19 the trigger person?

20 MR. CROWE: Yes, and we also wanted to know the  
21 names of the individuals who aided and abetted the  
22 murder and the roles that they played. Those were for  
23 the two substantive counts for the murders of Darryl  
24 and Anthony Wyche.

25 As I said, it was really a very, very limited



1 Bill of Particulars that we asked for in that  
2 instance.

3 With respect to the third superseding  
4 indictment, and, as the Court knows, we have made a  
5 motion to dismiss certain allegations and to bar the  
6 government from putting on any evidence of activities  
7 after February 2004, which was the date which was  
8 supposedly the end date for all of these activities in  
9 the various counts, we just want to know who the  
10 members of the RICO enterprise were and to tell us who  
11 the people they thought were members after February  
12 2004. We want the same information for associates,  
13 which is a term that the indictment uses, and what  
14 they did after 2004.

15 Then we asked for acts of racketeering activity,  
16 as that term is defined in the statutes, which were  
17 committed after February of 2004.

18 In our motion to dismiss we make the claim, and  
19 it's pretty, you know, I think fairly forcefully, that  
20 we don't think that the government really has any  
21 evidence that this RICO enterprise, and the conspiracy  
22 to violate RICO, subsisted beyond that time.

23 We are asking for what I think is really the  
24 most basic type of information, and in a case such as  
25 this, which is both complex and very serious, we think

1       that it's something which is warranted.

2               Bills of particulars are funny things. I mean  
3       you can find authority for almost any proposition  
4       under the sun for a Bill of Particulars for either  
5       granting information or denying information.

6               The points which are clear under the Will case  
7       is that we don't have to show any cause for getting a  
8       Bill of Particulars. The Fourth Circuit decisions are  
9       quite clear that we are entitled to a Bill of  
10      Particulars and the Court has the discretion to grant  
11      a Bill of Particulars either where it furnishes  
12      necessary information about the crime that is charged  
13      or where it is necessary in order to prepare a  
14      defense.

15              We think that as far as that concerned, that it  
16      is just quite clear that what we have asked for, and  
17      again I would say that it is very, very limited, that  
18      we should be entitled to it.

19              THE COURT: Okay. Let me hear from the  
20      government.

21              MR. HARDING: Well, Judge, the --

22              THE COURT: I guess the focus is the Wyche  
23      murders, Mr. Harding.

24              MR. HARDING: Yes. We have turned over  
25      everything that the government is required to turn

1 over under Rule 16 and in fact, because of the  
2 scheduling of the trial of Mr. Gardner a year ago, we  
3 turn over the Jencks material for that murder to Mr.  
4 Gardner's attorneys at that time. I assume that Mr.  
5 Gardner's attorneys have not shared that information  
6 with their fellow defense counsel, but I can assure  
7 the Court that nothing that has been withheld from Mr.  
8 Crowe and Mr. Pyne is material that they should have  
9 been receiving under Rule 16. It's Jencks material,  
10 or Grand Jury transcripts is basically what we are  
11 talking about here.

12 The evidence that we have addressing the issues  
13 that Mr. Martin, I mean, sorry, that Mr. Crowe spoke  
14 to come from Grand Jury transcripts of our cooperators.

15 THE COURT: When are you going to provide Jencks  
16 for the September 17 trial?

17 MR. HARDING: Well, we provided it to Mr.  
18 Gardner's attorneys approximately a month before the  
19 start of that trial.

20 THE COURT: Are you going to keep with that  
21 schedule?

22 MR. HARDING: Yes, I think so, Your Honor. I  
23 might add for the benefit of Mr. Crowe, he already  
24 knows one of the cooperators who identifies his  
25 client's role in this murder and it is quite clear on

1 the papers because he has filed another motion to  
2 preclude the government from using that evidence,  
3 claiming that there is a Bruton issue. The  
4 government's position is that it is a co-conspirator  
5 statement.

6 But Mr. Crowe is not completely unaware of what  
7 the evidence is going to be regarding his client's  
8 participation in that crime.

9 THE COURT: When are you going to disclose who  
10 the shooter was in all the murders, to the extent you  
11 haven't so far?

12 MR. HARDING: Your Honor, there are disputes  
13 over who the shooters were.

14 THE COURT: Okay. Understandable.

15 MR. HARDING: And that's certainly true as to  
16 Mr. Coburn and Mr. Kurland. Now that's true for the  
17 Tanya Jones-Spence murder.

18 THE COURT: Is it true about all the murders?

19 MR. HARDING: I would say so. Yes, Your Honor.

20 THE COURT: Okay. When you say disputes, do you  
21 mean disputes among and between the government  
22 witnesses, between --

23 MR. HARDING: To some extent, and also there is  
24 some evidence that points in one direction and some  
25 evidence that points in another direction.

1 THE COURT: All right.

2 MR. HARDING: The government doesn't, of course,  
3 have to prove that some particular person was the  
4 shooter in order to convict someone of murder.

5 THE COURT: Right.

6 MR. HARDING: So we don't consider this to be an  
7 essential issue in our case.

8 In other words, some of what Mr. Crowe is  
9 seeking, he is probably never going to get in the form  
10 he would like it.

11 THE COURT: Because it doesn't exist.

12 MR. HARDING: That's right.

13 THE COURT: All right. Well, I'm going to deny  
14 the motion for a Bill of Particulars.

15 DEFENDANT MARTIN: Your Honor --

16 THE COURT: Mr. Crowe, you can expect to receive  
17 Jencks no later than August 17th. I'm going to hear  
18 from Mr. Coburn in a moment why I shouldn't order Mr.  
19 Coburn and Mr. Kurland to share with other counsel any  
20 discovery that they received that they haven't so far  
21 shared. If I need to hear that in camera, I will hear  
22 that in camera. But it seems to me --

23 It's hard for me to imagine a reason why I  
24 shouldn't do that, but I will hear from Mr. Coburn and  
25 Mr. Kurland in a moment.

1 Anybody else on --

2 DEFENDANT MARTIN: I accept --

3 THE COURT: Mr. Martin, I'm not going to permit  
4 repeated, I'm not going to permit repeated disruptions  
5 of the proceedings, sir.

6 DEFENDANT MARTIN: May I speak, Your Honor?

7 THE COURT: No, you may not. Please be seated.

8 DEFENDANT MARTIN: I accept your offer for  
9 value.

10 THE COURT: Thank you.

11 DEFENDANT MARTIN: I return your offer to you  
12 for value to close and settlement of the account.

13 THE COURT: Anybody else want to be heard on  
14 discovery issues? Mr. Martin?

15 MR. MARTIN: Your Honor, our motion was  
16 identical to Mr. Crowe's.

17 THE COURT: Okay.

18 MR. MARTIN: So since you denied the motion.

19 THE COURT: Thank you, Mr. Martin.

20 Mr. Coburn, can we take up that issue that I  
21 identified just now?

22 MR. COBURN: Absolutely, Your Honor. Actually,  
23 I haven't discussed this with Professor Kurland, but  
24 I'm sure he will just come up and grab me if I say  
25 anything that he disagrees with.

1 THE COURT: Well, you're pretty far away from  
2 him, so maybe he better come stand next to you.

3 MR. COBURN: Maybe I'll just talk fast before he  
4 can get here.

5 THE COURT: Go ahead.

6 MR. COBURN: I mean from my own point of view, I  
7 don't see any reason why, you know, we are entitled to  
8 some sort of special access to this material based on  
9 the fortuity of our having had an earlier single trial  
10 date. I think it would be appropriate.

11 Frankly, I mean there isn't any legitimate  
12 security concern here with respect to this Jencks  
13 material. I mean, you know --

14 THE COURT: Well, why don't you share it? Have  
15 you not been requested or do you feel some obligation  
16 or what?

17 MR. COBURN: We just wanted to be sure we  
18 weren't going to violate 6(c). But if Your Honor  
19 tells us that it's okay for us to share it, we are  
20 more than, I think we are more than delighted to do  
21 that.

22 In fact, it would be a lot easier, quite  
23 frankly, Your Honor, if the government would just make  
24 copies and distribute them rather than our taking care  
25 of that task.

1 THE COURT: Is it anything other than Grand  
2 Jury, any 302's or sixes or --

3 MR. COBURN: I don't remember much of that, Your  
4 Honor. I think it is pretty much Grand Jury. There  
5 might be some additional material, but it is minimal.

6 THE COURT: All right. Mr. Kurland.

7 MR. KURLAND: Yeah. We haven't shared it up to  
8 this point, absent a Court order. There is some --  
9 most of it is Grand Jury material, not all of it. One  
10 aspect, which we'll talk about a little bit later to  
11 the extent we get to some of the severance and Bruton  
12 issues, none of it has been disclosed, at least  
13 directly.

14 There is one particular witness who in other  
15 discovery that has been given to all counsel, similar  
16 relevant statements were part of other discovery.

17 Again, if there is other additional material  
18 that the government eventually is going to give as  
19 Jencks material to everybody later on --

20 Like I'm not sure if what Mr. Harding gave us,  
21 the Jencks material a year ago, that was with respect  
22 to a truncated trial just for Mr. Gardner. There  
23 might well be other Jencks material that comes to  
24 everybody a month before.

25 But other than that, pursuant to a Court order,



1 if the Court wants us to do that or again, I echo Mr.  
2 Coburn's comment, it would be easier for the  
3 government to simply make additional copies of this  
4 stuff.

5 THE COURT: Well, I'm not sure if that's true or  
6 not. Let me ask Mr. Harding.

7 What makes the most sense, Mr. Harding? Are you  
8 able to just have it photocopied three more times?

9 MR. HARDING: Judge, the government objects to  
10 turning it over to the other attorneys.

11 THE COURT: What's the basis for the objection?

12 MR. HARDING: The basis is the whole reason why  
13 the government withholds things like 6(e) information  
14 until it absolutely has to turn it over in the first  
15 place, which is that we have security concerns  
16 regarding our witnesses. We have --

17 THE COURT: Okay.

18 MR. HARDING: Ongoing --

19 THE COURT: All right. Let me cut you off,  
20 because that's exactly what I was thinking why I  
21 should order Mr. Coburn and Mr. Kurland to turn it  
22 over. The government is going to object. I don't  
23 need to override the government's concerns.

24 Defense counsel have it. Defense counsel should  
25 have it. It's really to me a very simple proposition.

1       There's absolutely no reason whatsoever why the  
2       fortuity of the scheduling of the trials --

3               And I understand the government would have  
4       preferred that there not be severance in the case, but  
5       there was. It was postponed.

6               There's just no reason why these other six  
7       lawyers shouldn't have what Mr. Kurland and Mr. Coburn  
8       have, particularly in light of what Mr. Coburn has  
9       described, from the defense perspective, at least  
10      their perspective, it's not earth-shaking stuff.

11              But I'm not going to order the government to do  
12      it if the government really feels strongly that the  
13      government shouldn't have to do it. It's just a  
14      matter of who pays for it, who pays for the  
15      photocopying.

16              MR. HARDING: Judge, would Your Honor order  
17      defense counsel not to share the material with their  
18      clients? Maybe this is moot, given their clients'  
19      refusal to cooperate or communicate with their counsel  
20      anyway. But the government feels that as a security  
21      measure --

22              THE COURT: But that wasn't the condition that  
23      Mr. Kurland and Mr. Coburn received.

24              MR. HARDING: No, they benefited from the fact  
25      that the government believed it was within a month of

1 trial and, therefore, turned over the bulk of the  
2 Jencks material prematurely.

3 THE COURT: Okay. I'm not going to order  
4 counsel not to share it with their clients. I am very  
5 concerned, as always, about the security of  
6 participants in a criminal trial, not least certainly  
7 witnesses that the government intends to call. But  
8 I'm not going to order counsel not to share this  
9 information with their clients.

10 As you point out, that may be a moot point  
11 anyway since the defendants aren't talking to their  
12 lawyers about anything meaningful.

13 MR. HARDING: Could I ask Your Honor that --  
14 it's a standard part of our discovery agreements with  
15 defense counsel that they not provide copies.

16 THE COURT: Absolutely, absolutely. Copies are  
17 not to be provided.

18 MR. HARDING: Thank you, Your Honor.

19 THE COURT: Absolutely. But sharing the  
20 information is permitted.

21 Yes, Mr. Coburn.

22 MR. COBURN: Your Honor, may I just raise one  
23 logistical concern with the Court for which I  
24 apologize, which is when we got this packet of  
25 material --

1 THE COURT: You marked it all up?

2 MR. COBURN: I usually don't put markings on  
3 it. But when it came in, it was very shortly before  
4 we were going to try the case, and I'm just not sure  
5 that I segregated it before integrating it into all of  
6 my witness folders.

7 THE COURT: Was there a cover letter?

8 MR. KURLAND: Yes.

9 THE COURT: I'm sure the government is very  
10 careful.

11 All right. Copy what you need to, including the  
12 cover letter, and counsel can review it and let you  
13 know if there is something missing when they compare  
14 what's in the cover letter from what they get from  
15 you. Okay?

16 MR. COBURN: Very well.

17 THE COURT: If you need to black out your own  
18 work product or something, of course, you can do that.

19 MR. COBURN: Okay. I appreciate it, Your Honor.

20 THE COURT: Of course, you will be reimbursed  
21 for the photocopying cost, Mr. Coburn.

22 MR. COBURN: That wasn't the concern, Your  
23 Honor.

24 THE COURT: Okay.

25 MR. KURLAND: I just want to make it clear,

1       though, that we are specifically ordered to provide  
2       those copies and we are not going to be criminally  
3       prosecuted for violating 6(e).

4               THE COURT: Absolutely. I will enter an order  
5       to that effect, Mr. Kurland.

6               MR. KURLAND: Thank you very much.

7               THE COURT: Absolutely.

8               All right. Who wants to be heard on severance?  
9       It's fully briefed I think.

10              MR. TREEM: Your Honor, just way of  
11       introduction, this is Brendan Hurson, who is an  
12       associate in our office. I will defer to his  
13       authorship and research on this.

14              THE COURT: Thank you. Welcome, Mr. Hurson.

15              MR. HURSON: Thank you, Your Honor.

16              We sort of piggybacked off somebody else. I  
17       think that the form of our motion to sever actually  
18       comes in a reply to the government's responses to  
19       someone else's. So to some extent, like you said, it  
20       has been well briefed.

21              I mean to be frank, Your Honor, at some point  
22       this trial is going to start pitting people against  
23       each other, whether it be at the guilt --

24              And again, renewing Mr. Treem's comments  
25       earlier, our client is not here.

1           THE COURT: Let me do us all a favor, if it is  
2           that. Let's not even consider bifurcation of the  
3           penalty phase yet. We don't have to cross that bridge  
4           for a long time.

5           I understand it would seem perhaps odd to  
6           suggest that we could have what could be I suppose a  
7           four-month trial on guilt or innocence and then have a  
8           series of three-or-four-day penalty trials with the  
9           same jury, one at a time, but I'm not ruling that out.  
10          I agree it's unlikely, but it could happen that way.

11          So my point is we don't need to talk about  
12          severance for purposes of penalty.

13          MR. HURSON: Your Honor, I would say that it has  
14          been made clear by the government, and the statute  
15          says it has to be the same jury.

16          THE COURT: Right. I'm saying the same jury,  
17          but one at a time.

18          MR. HURSON: Well, we would say that that makes  
19          -- I mean that's exactly why we want the severance, to  
20          have the same jury hearing all these same facts.

21          THE COURT: Okay. Well, maybe I'm not being  
22          clear. As I understand the argument, there is the  
23          argument that you need severance for guilt or  
24          innocence and you need a severance for the penalty  
25          phase.

1 Yes, under federal law, the same jury must hear  
2 the penalty phase that heard guilt or innocence. What  
3 I'm saying to you is I don't see anything in the law  
4 that says you can't have four defendants go to trial  
5 in front of one jury, fewer than all four are subject  
6 to capital penalty, and then at the penalty phase have  
7 defendant number one have a penalty trial, defendant  
8 number two have a penalty trial, and then defendant  
9 number three have a penalty trial.

10 There is no, in other words, there is no  
11 compelling reason, it seems to me, to muddle the issue  
12 of severance with respect to guilt or innocence  
13 because you can always, by considering penalty issues,  
14 because you can always sever penalty issues, even in  
15 front of the same jury. Do you see what I'm saying?

16 MR. HURSON: I do I think.

17 THE COURT: So I would like to limit the present  
18 consideration to the question of whether there should  
19 be a severance for purposes of guilt and innocence.

20 MR. HURSON: Well, I think I understand what you  
21 are saying, Your Honor, and I certainly understand  
22 that there can be a case where the jury hears separate  
23 penalty phases, but again, it's the same jury.

24 THE COURT: Right, right.

25 MR. HURSON: And I understand there may be some

1 precedent for that. But our position is that whether  
2 or not the jury sits and hears separate penalty  
3 phases, they still know what they did in a previous  
4 proceeding.

5 What our argument is as to guilt/innocence and  
6 as to the penalty phase is that this may be shaping up  
7 to be a situation where we have no choice but to go  
8 after other co-defendants, and to do so pits a  
9 situation where not only is it us against the United  
10 States, it's us against one another. I think I termed  
11 it in the reply that we become in essence de facto  
12 prosecutors, one after another.

13 In our situation, it's quite simple factually.  
14 We may have an argument where our client was somehow  
15 under the control of another co-defendant. If the  
16 jury hears that, then they are put in a situation  
17 where they decide not only as to the factual  
18 culpability, where we may have some sort of argument  
19 as to a lesser degree, for example, on a murder  
20 charge, but more than that --

21 THE COURT: You mean a duress defense to a RICO  
22 prosecution?

23 MR. HURSON: Well, I'm certainly no expert in  
24 all these fields. But again, and not to take it back  
25 to the penalty phase, we are still sifting through



1 volumes of documents and trying to figure out exactly  
2 what tack to take, and with no cooperation, it's  
3 obviously very difficult. So some of this is  
4 conjecture, but what is certainly clear --

5 THE COURT: Excuse me. Go ahead. I'm sorry.

6 MR. HURSON: What is certainly clear is that as  
7 it pertains to our client, who is facing the death  
8 penalty, mitigating factors, and I don't mean to draw  
9 it into the second part --

10 THE COURT: That's what you keep doing.

11 MR. HURSON: I know, because in some ways it's  
12 impossible because it's going to be --

13 THE COURT: No, it's not impossible. Talk to me  
14 about why Mr. Harris can't receive a fair trial if his  
15 guilt or innocence is determined in front of the same  
16 jury as these three defendants.

17 MR. HURSON: Well, like I said, it's very  
18 difficult for me to answer that in the sense that we  
19 don't necessarily have all the ducks in a row that I  
20 could stand up there and say this is going to be point  
21 A, B or C, nor would I. Given the obvious spirit of  
22 sharing information that has been presented to the  
23 Court, we are not about to stand up there and lay out  
24 exactly what it is we plan on saying.

25 In some sense, I guess you've made it clear you

1 don't want to hear it, but if the same jury is secured  
2 in both phases of the trial, which they have to do --

3 THE COURT: Right.

4 MR. HURSON: -- we can't escape the issue of  
5 what happens in the sentencing phase. Whether it is  
6 presented separately, with only one defendant sitting  
7 at the table, or whether we are all here, it's still  
8 the same jury. To the extent that they make a  
9 decision as to defendant number one, they know why  
10 they've made that decision.

11 If defendant number two comes into the courtroom  
12 and begins to claim that the reason that he did  
13 something was because he was under a particular, did  
14 it for a particular reason, probably related to his  
15 control in our case by another defendant, they may  
16 have questions. They may have residual questions  
17 about why they made a decision in the first place.

18 THE COURT: I'm sorry. I'm not following, I'm  
19 not following, I'm not following.

20 MR. HURSON: And I can completely understand why  
21 you are not, Your Honor, because it is a bit  
22 confusing. But let me put it this way, if we're all  
23 seated together in a sentencing phase, and that has --

24 THE COURT: We're not talking about the  
25 sentencing phase.

1 MR. HURSON: So here's what --

2 THE COURT: We're talking about the guilt/  
3 innocence phase.

4 MR. HURSON: Well, I can't speak to the guilt/  
5 innocence phase clearly, except to say that it may  
6 become apparent, and as Your Honor is well aware, that  
7 there is no clear bright line in between the guilt/  
8 innocence and the sentencing. Some arguments are made  
9 at guilt/innocence that may in effect bleed into  
10 sentencing. So to the extent that you can drop a wall  
11 in between the two, I don't necessarily think you can  
12 do that.

13 But obviously, as you stated, if we had separate  
14 penalty phases, as to the first person to go, some of  
15 my concerns may be obviated; but as to those who come  
16 later, probably not.

17 But I can't necessarily speak to, aside from  
18 what I've already said, if we choose to attack, I mean  
19 culpability, factual culpability in the first portion  
20 of the trial, we would certainly pit one another  
21 against each other.

22 That's our major overriding concern here, is  
23 that we don't want a situation where we're set up  
24 having to go against each other and have the same jury  
25 sit and listen to all of this and put in their head

1 the ultimate question, who deserves to live and who  
2 deserves to die, and that may well be a conclusion  
3 that they draw at whatever stage of the trial. It may  
4 be in guilt/innocence, it may be in penalty, but they  
5 are looking at these individuals or perhaps not even,  
6 if they are not present, and saying somebody has to  
7 die. If the case is not severed --

8 THE COURT: Well, if the jury said that, I would  
9 hope the law would address it appropriately. That  
10 wouldn't be appropriate under any circumstances,  
11 somebody has to die.

12 MR. HURSON: Nobody knows what goes on behind  
13 the closed doors, Your Honor. That's my point.

14 As to the government's arguments, they seem to  
15 be drawing on the resource argument, that it's a  
16 question of resources and time. Maybe it's because  
17 I'm just out of law school and too ideal, but I don't  
18 think questions of resource and time should ever come  
19 into play in a death penalty case. This is the  
20 ultimate penalty. Whether or not we can save money  
21 here on there, I don't think that should ever be a  
22 concern.

23 Plus there has been arguments about extending  
24 the length of trial and this and that. If we are all  
25 pitted against one another, I don't see how a trial

1       could, you know, the length of trial would change. In  
2       fact, I'd argue that separate individual trials would  
3       possibly be shorter than one long trial, where  
4       everyone is grouped together.

5             You know, again, this is the government's  
6       problem by seeking the ultimate penalty, and I don't  
7       see why our client should be, based on a resource  
8       issue, penalized.

9             THE COURT: Are you arguing that -- I guess my  
10      question is how would your argument be different, if  
11      at all, if this were not a capital case?

12            MR. HURSON: Well, it certainly would eliminate  
13      some of the concerns as to whether or not, because  
14      frankly, the real concern is what is a jury, faced  
15      with deciding the question of life or death, going to  
16      do when faced with three individuals who are facing  
17      the death penalty? I mean if --

18            THE COURT: All right. So if I'm following you,  
19      you're suggesting that Mr. Mitchell and Mr. Gardner,  
20      in order to avoid the death penalty, could possibly  
21      cast Mr. Harris as exercising influence over them and  
22      forced him to commit murders?

23            MR. HURSON: To me, it's almost the opposite.

24            THE COURT: Well, what's the opposite?

25            MR. HURSON: I guess I feel somewhat

1 uncomfortable without having the client here and with  
2 the express reservations of not arguing the facts, but  
3 I'll say this. We have a client, Mr. Harris, who did  
4 not, at any point is it alleged, begin the commission  
5 of any violent acts until he met Mr. Mitchell, and our  
6 argument may be that it is Mr. Mitchell's influence on  
7 our client that led him to act in the way that the  
8 government is alleging. It's almost the opposite of  
9 what you are saying. It's not that others --

10 THE COURT: And why wouldn't you rather do that  
11 in a case, in a trial with Mr. Mitchell?

12 MR. HURSON: Well, because obviously Mr.  
13 Mitchell's counsel, and particularly knowing now, is  
14 going to go after us and go after our claims that he  
15 could be under any sort of influence.

16 THE COURT: I don't, I don't know that that's  
17 necessarily true.

18 MR. HURSON: Well, again --

19 THE COURT: It's not a situation of tit for tat.

20 MR. HURSON: Well, we don't know, and that's the  
21 point. Why err on the side of maybe, maybe not, when  
22 it's very simple to sever the trials and make sure  
23 that that concern is completely obviated?

24 THE COURT: Well, it's not simple to sever  
25 trials. The Court actually severed the trials and it

1 was the defendants' own acts that countermanded that  
2 order.

3 Look, I am going to deny your motion without  
4 prejudice. It's apparent that at some point perhaps,  
5 perhaps, in the next couple of months you may want to  
6 make an in camera proffer to somehow flesh out, shall  
7 we say, your argument. But right now I see no basis  
8 whatsoever for thinking, in the face of this third  
9 superseding indictment, that there is likely to be the  
10 kind of antagonistic defenses that the Fourth Circuit  
11 contemplates and the Supreme Court contemplates that  
12 justifies a severance.

13 Of course, a capital case is different, of  
14 course; but I just don't see how the Court can order a  
15 severance on the basis of this somewhat abstract  
16 argument. All right. Thank you.

17 MR. HURSON: I understand.

18 THE COURT: Anybody else want to be heard on  
19 severance?

20 MS. RHODES: Yes, Your Honor.

21 THE COURT: Ms. Rhodes.

22 MS. RHODES: Even in light of your decision,  
23 Your Honor.

24 THE COURT: Well, that's only Harris.

25 MS. RHODES: Right. On behalf of Mr. Mitchell,

1 we think, first of all, we would deserve a severance,  
2 whether or not it's for a capital case. I can assure  
3 you that there will be substantially antagonistic  
4 defenses if they are going to be arguing that Mr.  
5 Mitchell was controlling other people when we don't  
6 think there is going to be evidence that Mr. Mitchell  
7 was a shooter in these cases.

8 So that's going to be a critical part of the  
9 case. If he wasn't a shooter ever, then he may not  
10 have much responsibility here, and they are clearly --

11 THE COURT: That's not true as a matter of fact  
12 or as a matter of law, but I take your point.

13 MS. RHODES: Well, if he is not a shooter and he  
14 is not a leader, he may, he may simply be involved in  
15 a conspiracy, but that's going to be --

16 THE COURT: Well, it's called the Mitchell  
17 organization by the Grand Jury.

18 MS. RHODES: See, there are going to be three  
19 prosecutors. I mean we are going to have -- there are  
20 going to be substantially, I'm just saying not just  
21 antagonistic defenses, but like completely  
22 antagonistic defenses that are directly contradicted  
23 and finger pointing, and probably not just Harris to  
24 Mitchell, other ways as well.

25 So it's going to be, it's going to be, you know,



1 three or four prosecutors ganging up on each  
2 defendant, which, for one thing, may take longer.

3 But I think to answer the Court's inquiry of  
4 counsel who just spoke, that is going to be an issue.  
5 There are going to be antagonistic defenses. How can  
6 there not be? If somebody says that Mr. Mitchell was  
7 the leader of this organization and controlling  
8 things, how can we not, how do we refrain from  
9 attacking that? That's going to be the essential --  
10 that's going to be the essence of our defense then if  
11 that's the only way they can get to us.

12 THE COURT: But the government witnesses are  
13 going to say that.

14 MS. RHODES: Well, the government witnesses are  
15 going to say we don't know who the shooter was  
16 apparently.

17 THE COURT: The focus on who the shooter was, is  
18 that what you are talking about?

19 MS. RHODES: That's part of what it is. Mr.  
20 Harding has acknowledged that his witnesses are going  
21 to be going different ways on who the shooters are in  
22 these different offenses. Not just one killing, but  
23 all three of them there is conflicting information.

24 THE COURT: I'm not sure how important the  
25 specific identity of the shooter is in this context.

1 MS. RHODES: What I'm saying is the identity, it  
2 becomes important if people are saying it wasn't me,  
3 or if somebody says it was me, it was because Mr.  
4 Mitchell told me to.

5 In other words, if nobody, it's particularly  
6 important to us if nobody is identifying Mr. Mitchell  
7 as a shooter in any of these incidents, then we think  
8 it makes it that much more important to us that we not  
9 be attacked by others and be claimed to have been  
10 directing things from afar.

11 THE COURT: Okay. Go ahead.

12 MS. RHODES: Well, I think it's also, on top of  
13 the fact that this we believe would be severable under  
14 those circumstances, there is also the issue of the  
15 substantial Bruton problem we see with the lyrics that  
16 comes in under Mr. Harris's case.

17 THE COURT: I'm letting them in as  
18 co-conspirator statements. That's the basis on which  
19 I'm admitting, I'm admitting the lyrics.

20 MS. RHODES: I understand that. Our position is  
21 that they, we are objecting to that, and our position  
22 is they shouldn't come in and, therefore, create a  
23 Bruton problem.

24 The other issue where we believe there is a  
25 Bruton problem is an identification by Mr. Martin by a

1 co-defendant of, allegedly of our client's voice on --

2 THE COURT: Remind me of those facts.

3 MS. RHODES: On one of the --

4 THE COURT: I remember that there was a cell  
5 phone --

6 MS. RHODES: Right.

7 THE COURT: -- taken from one of the Wyches.

8 MS. RHODES: Right.

9 THE COURT: There was a speed dial to the voice  
10 mail of the Wyches' mother --

11 MS. RHODES: In-law.

12 THE COURT: -- in-law.

13 MS. RHODES: Yes. Her machine picked up.

14 THE COURT: And the machine picked up, without  
15 knowledge of those persons in possession of the cell  
16 phone.

17 MS. RHODES: Right.

18 THE COURT: And the recording was preserved.

19 MS. RHODES: Right.

20 THE COURT: Okay. Pick it up from there.

21 MS. RHODES: About 11 minutes or so.

22 THE COURT: All right.

23 MS. RHODES: Voices can be heard.

24 THE COURT: All right.

25 MS. RHODES: And different government witnesses

1 have identified defendant people as the voices.

2 THE COURT: Okay.

3 MS. RHODES: And Mr. Martin has identified Mr.  
4 Mitchell as one of the voices.

5 THE COURT: Okay. So at best, perhaps -- I  
6 don't know -- but at best, Mr. Martin's statement  
7 would be cumulative because others are going to  
8 identify Mr. Mitchell's voice?

9 MS. RHODES: There are conflicting -- the  
10 government's witnesses we believe conflict. In other  
11 words, there are many people who have been identified.

12 THE COURT: You mean whose voices have been  
13 identified?

14 MS. RHODES: Yes, yes, and it's not clear how  
15 many people are in fact on the tape.

16 THE COURT: All right. Now --

17 MS. RHODES: So there is some confusion.

18 THE COURT: Okay. So on what theory -- remind  
19 me how Martin made this statement. Under what  
20 circumstances? In other words, how does the statement  
21 come in against --

22 MS. RHODES: He was in custody I believe at the  
23 time, Your Honor.

24 THE COURT: Right.

25 MS. RHODES: And --

1 THE COURT: And they played the tape for him?

2 MS. RHODES: Yes.

3 THE COURT: He waived his Miranda rights,  
4 answered questions, and identified voices on the tape?

5 MS. RHODES: I don't recall if he waived Miranda  
6 on that.

7 MR. CROWE: Your Honor, I believe the Court --

8 THE COURT: Okay. We don't need to get into  
9 that. Yes, Mr. Harding.

10 MR. HARDING: I can simply this. I have  
11 conceded several times in my pleadings that that is a  
12 Bruton problem and we aren't going to use Mitchell's --

13 THE COURT: Identification by Mr. Martin.

14 MR. HARDING: Martin's identification of  
15 Mitchell's voice.

16 THE COURT: Right. That's where I was going.  
17 There would be no basis to admit -- it wouldn't even  
18 be admissible against Mr. Martin. Well, I mean it's  
19 an admission that he knows Mr. Mitchell's voice, if  
20 that were relevant.

21 But yeah, it wouldn't be admissible under any  
22 circumstances in the trial of Mr. Mitchell, whether or  
23 not he is tried with Mr. Martin, the voice  
24 identification.

25 So that's not a problem, and the government says

1 it's clearly not a problem because they are not going  
2 to use it.

3 MS. RHODES: All right. Your Honor, the other  
4 aspect of this is getting to the concern that it is a  
5 capital case and our concern is that by trying them  
6 together at the guilt/innocence phase, you are  
7 essentially forcing the jury on mitigation to do a  
8 comparative analysis.

9 THE COURT: Okay. And that's going to be true  
10 in any capital case with two or more defendants.

11 MS. RHODES: Right, right.

12 THE COURT: And so?

13 MS. RHODES: Our request as a result of that is  
14 for severance from everybody.

15 THE COURT: If we were writing on a clean slate,  
16 I would agree with the defense arguments that in a  
17 capital case, every defendant should be tried by  
18 himself or herself. That would be my position, but  
19 that's not the law. That's not the law.

20 MS. RHODES: Well, the Court has discretion,  
21 though, to grant a severance.

22 THE COURT: But the Court doesn't have  
23 discretion to do it the way the Court thinks it ought  
24 to be done. The Court only has discretion to do it  
25 the way the law requires or compels or permits it to

1 be done.

2 MS. RHODES: Well, when there are other  
3 significant problems that present themselves, like  
4 this issue of the antagonistic defenses, which is  
5 going to involve multiple prosecutors, I think that's  
6 certainly an appropriate legal basis.

7 THE COURT: Okay. Again, it may be that at some  
8 point, I don't know, in June or July, you are able to  
9 make some kind of in camera proffer. But on the basis  
10 of -- and I don't mean to diminish this notion of  
11 antagonistic defenses, but it's just an abstraction at  
12 this point. It's an abstraction.

13 Again, as we know, it's not just antagonistic  
14 defenses. It's antagonistic defenses that cut to the  
15 core of the defendant's right to a fair and impartial  
16 consideration of the case against him. So it's not  
17 jut antagonistic defense.

18 Of course, in this case, what we are stuck with  
19 is the record after November 2005, the record of these  
20 proceedings. The Court has perceived no antagonism  
21 between and among these defendants whatsoever. Even  
22 today we see the defendants continuing to make these  
23 parroted speeches.

24 MS. RHODES: True. But as the Court's earlier  
25 ruling indicates, we're going to be proceeding,

1 counsel will be proceeding as counsel sees fit.

2 THE COURT: Oh, absolutely, sure, and I wanted  
3 that, absolutely. But there is no perception on my  
4 part of antagonistic defenses.

5 MS. RHODES: How is blaming somebody else for  
6 being the shooter or you are going to be the shooter  
7 and somebody else denying that and positing a  
8 different, a contradictory theory --

9 THE COURT: I'm not even sure I would call that  
10 a defense. I mean I said to Mr. Hurson, do you mean  
11 duress, a duress defense to murder, a duress defense  
12 to a three or four or five or a six-year membership in  
13 a conspiracy?

14 Anybody else? Mr. Crowe?

15 MR. CROWE: Yes, Your Honor.

16 DEFENDANT MITCHELL: Your Honor, Your Honor, may  
17 I address the Court?

18 THE COURT: No, Mr. Mitchell.

19 DEFENDANT MITCHELL: I accept your offer. I  
20 reserve all rights, with explicit reservations and  
21 without prejudice.

22 THE COURT: Yes, Mr. Crowe.

23 MR. CROWE: Your Honor, we have two principal  
24 arguments for severance and I would like to address  
25 the two principal ones first.



1           Initially, when Mr. Martin is the only defendant  
2           against whom the government is not seeking the death  
3           penalty, I think it's a pretty fair assumption that  
4           Mr. Harding and Mr. Hanlon are going to seek a  
5           death-qualified petit juror. What I understand from  
6           my recent reading was that the people, under the  
7           Witherspoon decision, feel that the death penalty is  
8           morally permissible punishment and number two, and  
9           more importantly, that they are willing to impose it,  
10          and that they are going to challenge for cause, and  
11          the Court is going to grant challenges for cause, to  
12          people who do not meet the Witherspoon criteria.  
13          Intuitively, I think we all know that death-qualified  
14          jurors are more likely to convict.

15          Mr. Mitchell, fairly early on in this case,  
16          filed a motion to strike a supplemental notice of the  
17          intent to seek the death penalty, and he cited to some  
18          polls which had been taken in Maryland which indicated  
19          that, number one, people opposed to the death penalty  
20          are much less likely to come from Montgomery County  
21          and Baltimore City and Prince George's County. He  
22          also indicated that there was a statistical study  
23          which was published in the Law Review, which he cited,  
24          which indicated that the opposition to the death  
25          penalty was twice as high in African Americans as it

1 was with whites.

2 I'm fully aware of the Supreme Court's decision  
3 in Buchanan versus Kentucky. That was a case where a  
4 non-capital defendant did not ask for a severance, but  
5 what he asked for was --

6 He objected to the trial because he said he was  
7 going to be deprived of the right to an impartial jury  
8 selected from a fair cross-section of the community.  
9 The Court in that case found, among other things, that  
10 there was not convincing, compelling statistical  
11 evidence that that was the situation.

12 The guy, the petitioner, Buchanan, however,  
13 didn't ask for a severance. We are asking for a  
14 severance.

15 I would point out that even if the Court would  
16 hold that the defendant has no constitutional right to  
17 a trial by a regular, non-death qualified jury, even a  
18 defendant who is not charged with a capital offense,  
19 by the same token, the government can't make any claim  
20 that it has a right to try Mr. Martin before a jury  
21 which is not death qualified.

22 So we have asked either for a severance, which  
23 seems to me is an easier solution, or that there in  
24 fact be two juries impaneled, one for Mr. Martin, who  
25 is not going to be subjected to the death penalty, and

1       that jury would not have to be death qualified, and  
2       the second for the other defendants.

3               We feel, quite honestly, that if Mr. Martin was  
4       tried before a death-qualified jury, that the chances  
5       of his being convicted go up, and they go up  
6       substantially, and I doubt if there is any person in  
7       this courtroom, and we have all had a substantial  
8       amount of experience prosecuting and defending federal  
9       cases, who would really argue with that proposition.  
10      In fact, I don't even know that Mr. Harding would be  
11      likely to argue about it.

12             THE COURT: What is the second ground, Mr.  
13      Crowe?

14             MR. CROWE: The second ground, Your Honor, is  
15      that the one cooperator that we do know about is a  
16      fellow by the name of William Montgomery. We have  
17      received discovery. In fact, I think the Court may  
18      have this itself.

19             There is an affidavit which Detective Giganti  
20      filed in an effort to obtain a search warrant I think  
21      for property associated with Mr. Harris. In that  
22      affidavit Mr. Giganti says that Mr. Montgomery, who he  
23      refers to as an individual with the name of CS-3, said  
24      that he had a conversation with Mr. Gardner when both  
25      of them were in jail, and that Mr. Gardner at that

1 point recited some of the facts concerning the Wyche  
2 murder. One of our papers actually sets that out in  
3 some detail.

4 We know that this conversation from other  
5 references included sometime between April 17th of  
6 2002, which is the date that my client was in jail,  
7 and June 7th, which was the date of the arrest of Mr.  
8 Gardner. So this is pretty, pretty, pretty far back.

9 Montgomery says that he heard from Gardner all  
10 about the problems that Mitchell and Martin had with  
11 their murder charges, and then Gardner went on to  
12 explain about the accidentally transmitted voice mail  
13 messages. Gardner said that he didn't know who had  
14 pushed the button. He didn't know whether it was one  
15 of the Wyches or Mitchell who pushed the button on the  
16 phone.

17 Then he said Gardner explained, Gardner who is  
18 in custody with him, a co-defendant, explained that  
19 Martin was going to beat the charge because he had an  
20 alibi. He, that is Martin, had gone to a movie  
21 theater and bought two tickets, deliberately using a  
22 charge card to create a paper record for his alibi.

23 THE COURT: Why is that admissible?

24 MR. CROWE: I don't think it is admissible. The  
25 government has taken the position that it is

1       admissible under I think a fairly far-fetched theory  
2       that it is a statement in furtherance of the  
3       conspiracy. I don't think it's admissible for that  
4       purpose.

5               THE COURT: I tend to agree with you.

6               MR. CROWE: If the Court agrees with me, I  
7       probably will sit down right now.

8               THE COURT: I think I probably agree with you.  
9       I mean I can't imagine admitting Montgomery's  
10      statement, if this is what you are suggesting,  
11      Montgomery's statement that Gardner told him that  
12      Martin did all of this, went to the movies, blah,  
13      blah, blah, I don't see how that's in furtherance of  
14      any conspiracy.

15              MR. CROWE: We agree.

16              THE COURT: Other parts of the conversation may  
17      be, but the specific business about Martin, that's not  
18      in furtherance of any conspiracy.

19              MR. CROWE: I couldn't agree more, Your Honor.

20              As to the points other people have made, I think  
21      we have an antagonistic defense issue also which may  
22      impact other defendants more than it does us. But the  
23      Court is probably correct. That's maybe a matter  
24      which should be brought up closer to the point, closer  
25      to the point of trial.

1 THE COURT: Okay. Before I hear from you Mr.  
2 Harding, I'll hear finally from Mr. Kurland.

3 DEFENDANT MARTIN: Can I speak?

4 THE COURT: No, Mr. Martin.

5 DEFENDANT MARTIN: I accept your offer for  
6 value, return it to you for value to settle and close  
7 the account. I do not wish to argue the facts. I  
8 request the Court to issue me an appearance bond and  
9 waive all public costs. I request the Court to close  
10 all accounts, to release the order of the Court to me  
11 immediately. I request the Court to set off and  
12 adjust all public charges by exemption, in accordance  
13 with the Uniform Commercial Code 3-419, House Joint  
14 Resolution 192 and Public Law 17-10, and request  
15 immediate discharge.

16 THE COURT: Yes, Mr. Kurland.

17 MR. KURLAND: Your Honor, subject to responding  
18 to whatever Mr. Harding might say with respect to  
19 that, we had filed a series of pleadings dealing with  
20 potential Bruton issues related to the statement that  
21 the Court has just indicated on. We also feel very  
22 strongly that that statement is not in furtherance of  
23 the conspiracy, and if that's the Court ruling, I have  
24 nothing else to say. I suspect, though, that I might  
25 want to --

1 THE COURT: Well, Gardner's statement, some of  
2 Gardner's statements --

3 MR. KURLAND: Gardner's statement, Gardner's  
4 alleged statement might well be admissible, subject to  
5 redaction, as an admission against Gardner.

6 THE COURT: Exactly.

7 MR. KURLAND: But as a statement in furtherance  
8 of the conspiracy, which carries with it Bruton  
9 problems, but also ancillary evidentiary issues as  
10 well, as long as it comes in redacted as an admission,  
11 we can deal with that.

12 THE COURT: All right.

13 MR. KURLAND: We strenuously say that the  
14 evidence -- well, I'll see what Mr. Harding has to  
15 say.

16 THE COURT: Now, is Mr. Montgomery a member of  
17 the conspiracy?

18 MR. KURLAND: Well, our position is no. I  
19 suspect --

20 THE COURT: I mean was he at the time?

21 MR. KURLAND: He is not named in the indictment.

22 THE COURT: Well, we don't need to name him in  
23 the indictment for him to be a member of the  
24 conspiracy.

25 MR. KURLAND: You have to ask the government

1       that.

2               THE COURT:   That's what I'm going to do.

3               MR. KURLAND:   I will say this, though, that the  
4       government has already in another federal court  
5       pleading indicated that he was a member of another  
6       conspiracy at the time.

7               THE COURT:   Okay.   Let me hear from Mr. Harding.

8               MR. KURLAND:   Subject to being able to respond  
9       to whatever Mr. Harding says.

10              THE COURT:   Please sit down, Mr. Gardner.  
11       Please sit down.   Yes, Mr. Harding.

12              DEFENDANT GARDNER:   I would like to reserve all  
13       rights with explicit reservations and without  
14       prejudice, sir.

15              THE COURT:   Thank you.

16              Mr. Harding.

17              MR. HARDING:   Yes.   Judge, first of all --

18              THE COURT:   First, is there anything generally  
19       on severance before you focus on any particular  
20       argument?

21              MR. HARDING:   Well, Your Honor, let me just  
22       briefly say, since Your Honor doesn't want to deal  
23       with the sentencing phase at this point --

24              THE COURT:   Right, yeah.   I mean I understand  
25       that's not a panacea.   It just occurs to me that I



1 don't need to focus on that right now.

2 MR. HARDING: The issue of severance in capital  
3 cases has been directly addressed by the Supreme Court  
4 in Richardson versus Marsh, Buchanan versus Kentucky,  
5 and by the Fourth Circuit in the Tipton decision.  
6 Those decisions are quoted at great length in my  
7 pleading.

8 They argue that joint trials of capital  
9 defendants and joint trials with non-capital  
10 defendants is very appropriate, and one of the reasons  
11 it's appropriate is because it allows the jurors to  
12 compare culpability. This is something that the  
13 Supreme Court expects jurors to be able to do. So  
14 that's one of the concerns.

15 The Richardson decision speaks of the scandal  
16 and inequity of inconsistent verdicts that would  
17 result from severed trials in capital cases. The  
18 Buchanan decision speaks of the heightened reliability  
19 that results from a joint trial of capital defendants  
20 and non-capital defendants as well in a joint  
21 proceeding. These are the values that the government  
22 and the Supreme Court's case law are most interested  
23 in.

24 You know, Mr. Hurson also alludes to the  
25 resources issue and the interests of our victims and

1 the interests of our witnesses, and those are  
2 important values also. The Tipton decision treats  
3 those as important values that must be considered in  
4 the context of a severance motion in a capital case.

5 However, that is not the prime issue. The prime  
6 issue is the one that the Supreme Court stressed  
7 having to do with the fairness and equity of the  
8 decision-making process, and the government believes  
9 that those are the things that the government should  
10 -- that the Court should focus on most of all.

11 Your Honor, Mr. Crowe just raised the issue of  
12 the unfairness of having his client tried by a  
13 death-qualified jury, and he alluded to Buchanan  
14 versus Kentucky. He pointed out that the Court there  
15 was not faced with a motion to sever, but the  
16 defendant there claimed that he should be entitled to  
17 a non-death qualified jury. The other defendants  
18 could have a death-qualified jury and he should have a  
19 non-death-qualified jury.

20 The reason why Mr. Crowe hasn't cited any cases  
21 in support of this request is that there aren't any.  
22 It has been decided by the Supreme Court, and there  
23 are string cites of subsequent decisions. I'll simply  
24 read to you, if I may, very briefly the decision by  
25 another district court in this circuit, the Eastern

1 District of Virginia, in 316 F.Supp.2d 330, United  
2 States versus Lee, a 2004 decision, where the Court  
3 held, and I'm quoting from page 339 here, "The  
4 noncapital defendants' first argument has been  
5 squarely addressed and rejected by the Supreme Court  
6 in Buchanan versus Kentucky. There, the Supreme Court  
7 held that use of a death-qualified jury for a joint  
8 trial in which the death penalty is sought against  
9 only one defendant does not violate the noncapital  
10 defendant's Sixth Amendment right to an impartial  
11 jury. In so holding, the Supreme Court relied on its  
12 decision in the Lockhart versus McCree (expressly  
13 approving the practice of using the same jury in both  
14 the guilt and penalty phases of a capital murder  
15 trial).

16 In McCree, the Supreme Court made clear that the  
17 Constitution presupposes that a jury selected from a  
18 fair cross-section of the community is impartial,  
19 regardless of the mix of individual viewpoints  
20 actually represented on the jury, so long as the  
21 jurors can conscientiously and properly carry out  
22 their sworn duty to apply the law to the facts of the  
23 particular case.

24 Given this presupposition, and the government's  
25 significant 'interests in having a joint trial,' the

1 Supreme Court in Buchanan found no infringement of the  
2 petitioner's right to an impartial jury. In short,  
3 binding Supreme Court precedent makes clear that a  
4 death-qualified jury --"

5 THE COURT: Slow down.

6 MR. HARDING: -- binding Supreme Court precedent  
7 makes clear that a non-qualified jury, I'm sorry, that  
8 a death-qualified jury poses no constitutional problem  
9 with respect to noncapital defendants in a joint  
10 trial. As a result, defendants' argument for  
11 severance in this respect is without merit.

12 I should add, Your Honor, that in the Lockhart  
13 case, the Supreme Court was confronted with a lot of  
14 statistical and social science evidence about the  
15 supposed predisposition of death-qualified jurors to  
16 be more likely to convict, and the Supreme Court ruled  
17 that it was unconvincing and rejected the evidence.

18 Your Honor, I would like to respond, if I may,  
19 to the second argument that Mr. Crowe just made, and  
20 it is also one, as Mr. Kurland says, that he has dealt  
21 with in pleadings.

22 THE COURT: Yes. How does Montgomery's  
23 statement to Gardner -- how does Gardner's statement  
24 to Montgomery about what Mr. Martin did come in?

25 MR. HARDING: Okay. This is, of course, not a

1 constitutional issue, so I haven't actually dealt with  
2 it in writing, and I would appreciate the Court giving  
3 me an opportunity to do so.

4 THE COURT: Of course, of course.

5 MR. HARDING: I will briefly summarize my  
6 answer, however.

7 THE COURT: Okay.

8 MR. HARDING: Montgomery is, first of all,  
9 clearly a member of the conspiracy, as Mr. Kurland and  
10 Mr. Coburn well know, because they have his Grand Jury  
11 testimony.

12 THE COURT: And other than his assertion that he  
13 was a member of the conspiracy, I assume you have  
14 evidence aliunde that he is a member of the --

15 MR. HARDING: Yes, Your Honor.

16 THE COURT: Is he a member of the Mitchell  
17 organization?

18 MR. HARDING: He wouldn't know what -- none of  
19 these defendants would say they were members of the  
20 Mitchell organization I suppose, Your Honor, because  
21 that's just the phrase we used in our indictment.

22 THE COURT: Okay.

23 MR. HARDING: He was a member of this crew on  
24 numerous criminal ventures, going back to 1997. Mr.  
25 Montgomery grew up --

1 THE COURT: Give me a sample of the kind of  
2 things he did.

3 MR. HARDING: He went to New York with these  
4 defendants to buy --

5 THE COURT: Any criminal things he did.

6 MR. HARDING: With these defendants?

7 THE COURT: Yes, or of which they have  
8 knowledge.

9 MR. HARDING: He got guns from these defendants  
10 on several occasions.

11 THE COURT: From them?

12 MR. HARDING: Yes, from them.

13 THE COURT: To dispose of or something?

14 MR. HARDING: No, no, to use.

15 THE COURT: To use.

16 MR. HARDING: Yes.

17 THE COURT: Okay. Did he ever use --

18 MR. HARDING: Including the murder weapon and  
19 the other gun used in the Tanya Jones-Spence murder.

20 THE COURT: What did he do with the weapons, if  
21 you can say?

22 MR. HARDING: He hid them until they were used  
23 in the murder. He and Gardner concealed them in  
24 Gardner's girlfriend's house. Then they were used in  
25 the murder.

1 THE COURT: I see.

2 MR. HARDING: But one of them was a .40 caliber  
3 gun and he -- it's a kind of complicated story, Your  
4 Honor.

5 THE COURT: Oh, no, I'm getting it. I'm getting  
6 it.

7 So I mean when I said to Mr. Kurland that it  
8 wasn't a co-conspirator statement, obviously I  
9 responded to Mr. Kurland and added that element, which  
10 I anticipated might be the one thing that you were  
11 going to point out to me.

12 MR. HARDING: Yes, and I should point out too  
13 that Mr. Kurland and Mr. Coburn in their pleading  
14 based their argument that this was a Bruton problem on  
15 the claim that Mr. Montgomery was not a conspirator,  
16 and they cite the fact that in another federal  
17 indictment, specifically the Tyree Stewart indictment,  
18 there was a reference to the person who was hired to  
19 kill a man named Terry Cheeks as a co-conspirator with  
20 Tyree Stewart.

21 Well, this person, although he is not named in  
22 the indictment, was in fact Will Montgomery, and Will  
23 Montgomery was indeed hired, did a hit for Tyree  
24 Stewart.

25 That does not mean that he is not a member of

1 this crew. Murder for profit is one of the named  
2 purposes of the Mitchell organization in the  
3 indictment. It is perfectly possible to be a member  
4 of two different criminal agreements. In fact, Mr.  
5 Montgomery's involvement with the Tyree Stewart  
6 organization was limited, limited to that one  
7 incident, where he participated in a hit with Mr., on  
8 behalf of Mr. Stewart and got paid for it.

9 I'm not intending to introduce any evidence of  
10 that, of course, but the point is --

11 THE COURT: I know.

12 MR. HARDING: -- since 1997, Mr. Montgomery has  
13 been involved in home invasion robberies, street  
14 robberies, drug trafficking on a continuing basis with  
15 these defendants, traveling to New York with them to  
16 get drugs.

17 He has gotten firearms from them. He has been  
18 involved in shootings with them, not murders so far as  
19 we know, until the Tanya Jones-Spence murder, but  
20 other kinds of shooting incidents he was involved in  
21 with these defendants.

22 THE COURT: So in effect, this encounter is,  
23 what, at the Baltimore City Detention Center?

24 MR. HARDING: No. This is not a statement that  
25 was made in the detention statement.



1 THE COURT: Mr. Crowe said it was while they  
2 were both locked up together.

3 MR. HARDING: No. Mr. Crowe, I don't recall him  
4 saying that.

5 THE COURT: I thought that was what he said.

6 MR. HARDING: I'm sure he would agree with me  
7 that that was not the case. It was made while they  
8 were planning to do an act in furtherance of this  
9 conspiracy; namely, to rob Darius Spence, and also  
10 they had a plan involving the robbery of a drug dealer  
11 by the name of Goose. Mr. Martin was involved in  
12 this.

13 THE COURT: Wait a minute. I thought this was a  
14 discussion after the Spence murders.

15 MR. HARDING: No, no.

16 THE COURT: Isn't that where the --

17 MR. HARDING: No.

18 THE COURT: -- cell phone thing happened?

19 MR. HARDING: That was the Wyche brothers'  
20 murders.

21 THE COURT: I'm sorry. I'm sorry. So it was  
22 after the Wyche brothers --

23 MR. HARDING: After.

24 THE COURT: -- which was before the Spence  
25 murder.

1 MR. HARDING: Yes. Mr. Martin and Mr. Gardner  
2 and Mr. Montgomery and possible other co-conspirators  
3 were discussing who they were going to rob.

4 THE COURT: Like who they were going to rob  
5 next.

6 MR. HARDING: Yes.

7 THE COURT: Okay. All right.

8 MR. HARDING: Mr. Martin is then abruptly  
9 arrested for the Wyche brothers' murders on April  
10 17th.

11 Mr. Gardner also actually was arrested  
12 coincidentally on a violation of parole around the  
13 same time, but he only stayed in jail a very short  
14 time and he got out.

15 He discussed how this was going to affect their  
16 plans with Mr. Montgomery by pointing out that, first  
17 of all, Gardner was not a risk. He was not a danger  
18 because his voice was not on the tape. So that's the  
19 first thing he had to do to inform Montgomery of. He  
20 was going to be available.

21 Martin got picked up, according to Gardner,  
22 because his voice was on the tape and they mentioned  
23 the name Wayne actually on this taped conversation  
24 that was inadvertently intercepted on the Wyche  
25 brothers' mother's cell phone, on the voice mail.

1           Mr. Gardner also has to explain to Mr.  
2           Montgomery that they need money to pay for Martin's  
3           attorney. They need money quickly, and that in fact  
4           is the reason why they transformed their immediate  
5           target from the drug dealer named Goose to Darius  
6           Spence. They figured they could get the Spence murder  
7           or robbery done more quickly, and they proceeded along  
8           those lines.

9           They needed to get money for Martin's attorney  
10          and Goo, Mr. Gardner, explained that Martin also was  
11          going to be out of jail soon because he had this  
12          alibi. He would be able to rejoin them. He would be  
13          on the street with them pretty soon because his alibi  
14          was so good.

15          Martin was so clever, that he had gone to a  
16          movie theater prior to the Wyche brothers' murder and  
17          bought a ticket using his credit card and he had the  
18          receipt and it would show that he was watching a movie  
19          at the time of the murder.

20          THE COURT: Okay. I'm with you. I see.

21          MR. HARDING: So the government's position is  
22          going to be when we submit something in writing, Your  
23          Honor, that this clearly was a statement made by a  
24          co-conspirator -- Gardner is a co-conspirator. He's a  
25          declarant. He is the one who has to be member of the

1 conspiracy, but Montgomery is a member of the  
2 conspiracy too -- and it was made in furtherance of  
3 the conspiracy. There is copious case law on this.

4 THE COURT: No, no. I hear you, Mr. Harding. I  
5 was assuming that Mr. Montgomery was just somebody who  
6 happened to be at the detention center who, for  
7 whatever reason, became a government witness.

8 MR. HARDING: No, Your Honor.

9 THE COURT: I understand exactly what you are  
10 saying. Clearly, a conversation between two members  
11 of a conspiracy about plans, about needing lawyers,  
12 about getting money, about the next crime, all of that  
13 would be in furtherance of the conspiracy. I agree  
14 with you.

15 MR. HARDING: Thank you. I'll be happy to put  
16 all this on paper so defense counsel will have a full  
17 opportunity to respond.

18 But I would note that Mr. Kurland and Mr. Coburn  
19 didn't even raise the in furtherance of the conspiracy  
20 argument in their motion. They argued simply that  
21 Montgomery was not a member of the conspiracy, and I  
22 suggest to Court that they have read the case law well  
23 enough to know that these statements were quite  
24 clearly in furtherance of the conspiracy. That's why  
25 they confine it to a footnote. Actually, they do

1 preserve that issue in a footnote.

2 THE COURT: Okay. Let me give Mr. Crowe a  
3 chance because I think I seriously misunderstood Mr.  
4 Crowe, and I want to give him a chance before we break  
5 for lunch to respond if he wants.

6 I'm sorry, Mr. Crowe. I misunderstood.

7 MR. CROWE: Your Honor, I believe that I did  
8 make a mistake when I said they were both in custody  
9 at that point.

10 THE COURT: Okay.

11 MR. CROWE: I don't believe that that is the  
12 situation.

13 THE COURT: The picture that emerged from my  
14 mind was simply, you know, Mr. Gardner got arrested  
15 for something, Mr. Montgomery happened to get arrested  
16 for something, they were together at the detention  
17 center, and they were having chitchat.

18 MR. CROWE: I would ask the Court to understand  
19 that 90 percent of what I just heard from Mr.  
20 Harding --

21 THE COURT: You're learning for the first time.

22 MR. CROWE: -- I'm hearing for the first time.  
23 I expect --

24 THE COURT: Because they have the Montgomery  
25 Jencks and you don't.

1 MR. CROWE: That's correct. I, of course, knew  
2 that Montgomery was, I think he was the person driving  
3 the car at the time of the Tanya Jones-Spence murder.

4 But it had always been my understanding that  
5 although a claim would be made that he was a member of  
6 the conspiracy, that certainly Gardner's attorneys  
7 were going to be arguing very vociferously that he was  
8 not. I knew that they were going to do that on the  
9 basis of the transcript in other proceedings in  
10 Baltimore County in the Tanya Jones-Spence murder,  
11 which I had read, and also that they mentioned in a  
12 footnote that they had had some Grand Jury testimony.  
13 In their response, they noted in a footnote that they  
14 had Grand Jury testimony from Montgomery, which I  
15 understood was supportive.

16 Be that as it may, and whatever the evidence is  
17 going to show, I think the Court would be hard  
18 pressed, even on the basis of what is at this point a  
19 proffer from the government, to say that simply  
20 Gardner's statement that my client had an alibi,  
21 perhaps a false alibi, was in any fashion in  
22 furtherance of a conspiracy.

23 But I'm really going to have to wait until I see  
24 what Mr. Harding says, and perhaps more importantly,  
25 until we have a chance to read the additional

1 discovery, which we are going to be getting I guess  
2 sort of third hand from Mr. Coburn and Professor  
3 Kurland.

4 THE COURT: Thank you, Mr. Crowe.

5 Briefly, Mr. Kurland.

6 DEFENDANT MARTIN: Your Honor, I accept my  
7 attorney's offer for value and return it to him for  
8 value to settle and close the account. I do not wish  
9 to argue the facts. I request the Court to issue me  
10 an appearance bond, waive all public costs. I request  
11 the Court to close all accounts and issue an order of  
12 the Court immediately. I request the Court to set off  
13 and adjust all public charges by exemption, in  
14 accordance with the Uniform Commercial Code 3-419,  
15 House Joint Resolution 192, and Public Law 73-10, and  
16 request immediate discharge.

17 THE COURT: I want to remind the defendants what  
18 I said before. Everything you say in this courtroom  
19 potentially becomes evidence against you. I can't  
20 make it more clear than that, everything you say.

21 Yes, Mr. Kurland.

22 MR. KURLAND: Judge, I just want to make sure  
23 that even though we had filed some preliminary motions  
24 with respect to this, that when the government files  
25 its more detailed issue with respect to the

1 co-conspirator statements, that we have an opportunity  
2 to respond specifically to what the government has  
3 filed.

4 I want to correct one misimpression, and without  
5 hopefully violating 6(e). May I read one line out of  
6 Mr. Montgomery's Grand Jury testimony?

7 THE COURT: Why don't you just paraphrase  
8 whatever it is. Just paraphrase.

9 MR. KURLAND: Well, in his testimony he  
10 basically says, when asked specifically about selling  
11 drugs together, the question, do you guys sell drugs  
12 together or separately or what; answer, no. They sold  
13 their drugs and I sold mine.

14 THE COURT: Okay.

15 MR. KURLAND: But the point is --

16 THE COURT: That doesn't exclude --

17 MR. KURLAND: Your Honor, I understand that.  
18 But with respect to this critical issue as to whether  
19 or not Mr. Montgomery is both a member of the  
20 conspiracy and separately whether or not the statement  
21 is in furtherance of the conspiracy, at the time the  
22 Court evaluates what is now going to be a pretrial  
23 proffer, which is fine with us, the Court has to make  
24 a finding that the government has established by a  
25 preponderance of the evidence. I submit to you, Your



1 Honor, that with respect to the voluminous information  
2 we have, not just the Grand Jury testimony, but the  
3 tons of under oath evidence that Mr. Montgomery has  
4 provided in other proceedings, that at best it's going  
5 to be about 48, 52 --

6 THE COURT: Well, Mr. Gross says he was the  
7 driver at the Spence murder.

8 MR. KURLAND: That's irrelevant to whether or  
9 not --

10 THE COURT: It's not irrelevant.

11 MR. KURLAND: Your Honor, it's irrelevant. I  
12 submit, Your Honor, that it's irrelevant whether or  
13 not that murder was part of the Mitchell organization  
14 that's charged in the indictment. That's still an  
15 open issue.

16 THE COURT: It's not an open issue for the Grand  
17 Jury.

18 MR. KURLAND: But the Grand Jury --

19 Your Honor, again, rather than fight this out  
20 here -- I mean this is significant for a variety of  
21 issues.

22 Simply because Mr. Montgomery may or may not  
23 have been involved in the Spence murder doesn't  
24 automatically mean that the Spence murder is part of  
25 the larger conspiracy, despite what is alleged in the

1 indictment.

2 THE COURT: I understand that. I understand  
3 that. I was only saying that if the Spence murder, as  
4 alleged, is part and parcel of the conspiracy, and if  
5 he was the wheelman, that pretty much clenches it.  
6 Then he is a part of the conspiracy. If only for one  
7 night, if only for a half an hour, he is a member of  
8 the conspiracy.

9 MR. KURLAND: Your Honor, in every trial that I  
10 have been in, the Court gives an instruction to the  
11 jury that the indictment is jut a piece of paper. So  
12 the allegations --

13 THE COURT: No, no, no. The Court doesn't say  
14 it's just a piece of paper.

15 MR. KURLAND: Yes, it does.

16 THE COURT: No. The Court says it's an  
17 accusation. It's not evidence. It's much more than  
18 just a piece of paper.

19 MR. KURLAND: In light of that, again, the  
20 government is still going to have to prove, after we  
21 get to present our case, responding to what evidence  
22 they proffer on the significant hurdle with respect to  
23 the evidentiary issue as to whether something is done  
24 in furtherance of the conspiracy. It's not just  
25 automatic simply because it's in the indictment.

1 But I am sure the Court will keep an open mind  
2 on that.

3 THE COURT: Of course.

4 MR. KURLAND: I will welcome the opportunity to  
5 respond to whatever the government files.

6 THE COURT: Of course.

7 We are going to break for lunch and we will  
8 return at two p.m. I think we will have the one  
9 witness. We will have argument on the motion to  
10 dismiss, and I think that should conclude what we need  
11 to do I hope for this week. But if we have to come  
12 back tomorrow morning, we will.

13 If the defendants continue to be disruptive, I  
14 am going to exclude the defendants. I hope that Mr.  
15 Harris can join us this afternoon; but if not, we will  
16 proceed as we have.

17 Yes, Mr. Martin.

18 MR. MARTIN: Your Honor, with your permission, I  
19 would like to be excused this afternoon. I had  
20 surgery recently and I have to go back to the doctor  
21 this afternoon.

22 THE COURT: Certainly, Mr. Martin. We are in  
23 recess till 2 o'clock.

24 (A luncheon recess was taken.)

25 AFTERNOON SESSION

1 THE COURT: Good afternoon. Ready to proceed,  
2 Mr. Harding.

3 MR. HARDING: Yes, Your Honor.

4 MR. TREEM: Your Honor.

5 THE COURT: Yes, Mr. Treem.

6 MR. TREEM: I ran up to the Marshal's Office  
7 just to get an update. Mr. Harris is not going to be  
8 allowed to travel out of the institution today. So he  
9 won't be here at least today.

10 THE COURT: All right.

11 MR. TREEM: We will advise the Court as we get  
12 more information.

13 THE COURT: Thank you, Mr. Treem.

14 MR. HARDING: Your Honor, the United States  
15 calls Sergeant Richard Willard.

16 RICHARD WILLARD  
17 a witness called on behalf of the Government, having  
18 been previously duly sworn, was examined and testified  
19 as follows:

20 THE CLERK: Please be seated.

21 Please speak directly toward it and state your  
22 name and spell it for the record.

23 THE WITNESS: I'm Sergeant Richard Willard,  
24 common Richard, last name Willard, W I L L A R D.

25 DIRECT EXAMINATION

1 BY MR. HARDING:

2 Q Good afternoon, Sergeant Willard. Can you tell  
3 us how you are employed right now?

4 A I am employed with the Baltimore City Police  
5 Department.

6 Q How long have you been employed by them?

7 A 15 years.

8 Q Can you tell us where your assignment is right  
9 now?

10 A I'm currently in charge of a new task force  
11 dealing with straw purchases of handguns that were  
12 before me, the Organized Crime Division of Baltimore  
13 City.

14 Q Okay. That would be in the Headquarters  
15 Building then?

16 A Yes, sir.

17 Q Can I ask you what your assignment was back in  
18 June of 1999?

19 A In June of 1999, I was assigned to the Flex Unit  
20 in the southwestern district.

21 Q Let me call your attention to an arrest at about  
22 1:30 p.m. on June 18, 1999. Did you participate in an  
23 arrest at about 1:30 in the afternoon that day?

24 A Yes, sir, I did.

25 Q Was that arrest initiated by informant

1 information?

2 A We received information into the office of a  
3 person carrying guns and selling drugs in the area of  
4 the 300 block of South Pulaski Street.

5 Q Well, what kind of person was this informant, to  
6 the best of your recollection?

7 A It has been eight years, sir. I mean we used to  
8 get a lot of informants and people calling into the  
9 station and giving information.

10 Q Okay. People from the neighborhood?

11 A Yes, sir.

12 Q So is it fair to say you can't remember the name  
13 of the informant at this point?

14 A No. I mean a lot of times we went out on the  
15 street, and as the Flex Unit, we would get calls into  
16 the station and we would get information from  
17 informants, and we were expected to go on the street  
18 and try to track down the leads and information on  
19 that.

20 Q What did this informant tell you?

21 A He told us that there would be a person that  
22 drives a gold station wagon, a Ford Taurus, that drops  
23 off cocaine in the area of the 300 block of South  
24 Pulaski Street, that when he came into the area to  
25 drop off drugs, he always carried a handgun in his

1 car.

2 Q Was that in your district, the 300 block of  
3 South Pulaski Street?

4 A Yes, sir.

5 Q So what did you do after you got this  
6 information?

7 A We got the information. We went up to area. A  
8 group of us set up. While we were there, we observed  
9 a car pulling into the neighborhood. When we observed  
10 him come around and turn the corner of the 300 block  
11 of South Pulaski Street -- I believe that's Ashton  
12 Street, westbound -- he was smoking a hand-rolled  
13 cigar, like a rerolled cigar, commonly used, commonly  
14 called a blunt to smoke marijuana out of.

15 Q Was there anybody in the vehicle with him?

16 A To the best of my knowledge, I don't believe  
17 there was. I didn't put it in my report, so I  
18 wouldn't assume there was anyone else.

19 Q So you did prepare a report on this event; is  
20 that correct?

21 A Yes, sir.

22 Q And a Statement of Probable Cause?

23 A Yes, sir.

24 Q Now you said, you just said that a vehicle came  
25 into the neighborhood. What was the description of

1 the vehicle?

2 A It was a gold Ford Taurus station wagon.

3 Q So did that match the description that you had  
4 been given by this informant who called into your  
5 unit?

6 A Yes, sir.

7 Q Okay. So what did you decide to do after you  
8 saw this guy smoking a rerolled blunt pull into the  
9 area?

10 A We stopped the vehicle. We caught up with the  
11 vehicle and stopped it in the 200 block of South  
12 Smallwood Street. I approached the driver's side of  
13 the vehicle.

14 As we were approaching, we observed him making  
15 motions down towards the floorboard area of the  
16 vehicle. We asked him to step from the vehicle. We  
17 could smell the marijuana. It was very strong.

18 Down at the floorboard, there was burnt  
19 marijuana laying down near the right side of the  
20 console, like under where his leg would be, and the  
21 butt of a handgun sticking out from underneath the car  
22 -- underneath the seat, on the driver's side.

23 Q Was the driver's side window open or closed, do  
24 you recall?

25 A To the best of my recollection, it was open. I



1       can't --

2       Q       Okay. Did you put in your report anything about  
3       when you first smelled the marijuana?

4       A       As we walked up to the vehicle.

5       Q       Is that to the best of your recollection now?

6       A       Yes, sir.

7       Q       Okay. What happened then after you got up to  
8       the vehicle?

9       A       Well, once we got up to the vehicle, we smelled  
10      the marijuana. Based on the information from the  
11      source of information, and based on the other  
12      observations of him smoking the rerolled cigar and  
13      possible marijuana, we asked him to exit. We removed  
14      him from the vehicle and observed the marijuana  
15      sticking on the floorboard, laying on the floorboard  
16      right under his seat where he made the gestures. We  
17      recovered that and located the handgun underneath the  
18      seat.

19      Q       When did you first notice the handgun?

20      A       As we going down for the cigar, where it was  
21      laying, you could see the handgun sticking right up  
22      under the seat, the butt of it.

23      Q       So did you at that point arrest the occupant of  
24      the car?

25      A       Yes, he was.

1 Q What was his name?

2 A Shelley Wayne Martin.

3 MR. HARDING: I have no further questions at  
4 this time. I have one more piece of evidence in this  
5 case, Your Honor, but I will wait until  
6 cross-examination is over with.

7 THE COURT: Very well. Mr. Crowe.

8 DEFENDANT MARTIN: Your Honor, I accept the  
9 government's offer for value, return it to the  
10 government for value, request settlement and close the  
11 account. I do not wish to argue the facts. I request  
12 the Court to issue me an appearance bond, waive all  
13 public costs. I request the Court to close all  
14 accounts, release the order of the Court to me  
15 immediately.

16 I request the Court to offset, setoff and adjust  
17 all public charges by exemption, in accord with  
18 Uniform Commercial Code 3-419, House Joint Resolution  
19 192, and Public Law 73-10. I request immediate  
20 discharge.

21 THE COURT: You may proceed, Mr. Crowe.

22 CROSS-EXAMINATION

23 BY MR. CROWE:

24 Q Good afternoon, sergeant. Are you in fact a  
25 detective.

1 A I'm a detective sergeant right now, yes, sir.

2 Q Are you aware that this case involves the  
3 murders of individuals by the name of Darryl and  
4 Anthony Wyche?

5 A I have no knowledge of the case past Mr. Martin.  
6 I have been involved in other cases.

7 Q Now you, at the time this occurred, you were in  
8 the southwest district; is that correct?

9 A Yes, sir.

10 Q Is the 800 block of Vine Street in the southwest  
11 district?

12 A I believe that's the western district.

13 Q The time that we are talking about, what other  
14 officer or officers were with you?

15 A I remember Kevin O'Gavin was there and possibly  
16 Cliff McWhite. I'm not sure of everyone else, but I  
17 remember Kevin Roberts was with me at the car.

18 Q Do you know an Officer Hollingsworth?

19 A Christopher Hollingsworth?

20 Q Yes. Do you know if he was with you?

21 A He was in the unit. I'm not sure if he was  
22 there.

23 Q This arrest, as I understand it, occurred about  
24 1:30 in the afternoon; is that correct?

25 A Yes, sir.

1 Q When did you speak with the informant?

2 A I don't recall the exact time I spoke with him.  
3 It was prior to the arrest.

4 Q Was it minutes before, hours before?

5 A It could have been both. It could have been  
6 days.

7 Q You have no idea?

8 A Sir, this was eight years ago.

9 Q Now you told Mr. Harding that you don't recall  
10 the name of the informant. Was the informant a man or  
11 a woman?

12 A Our unit used to get calls every day, sir. We  
13 got the information of what I wrote in the report at  
14 the time.

15 Q As you sit here today, how do you know that you  
16 talked to an informant?

17 A Because that's what I wrote in my report, sir.

18 Q So you are testifying on the basis of the  
19 information in your report, not on the basis of any  
20 independent recollection whatsoever; is that correct?

21 A I remember the car and I remember Mr. Martin. I  
22 remember walking up to the car. I don't remember how  
23 we got the information and when the call came in. We  
24 got calls every day.

25 Q But you have no independent recollection, no

1 recollection independent of your report that you in  
2 fact talked with an informant; is that correct?

3 A No, sir.

4 Q The report didn't even refresh your recollection  
5 that you had talked to an informant, did it?

6 A It leads me to believe that I did talk to an  
7 informant because that's what I wrote in the report,  
8 sir.

9 Q The informant in question, was this a concerned  
10 citizen who made a call out of the blue to say that he  
11 disliked drugs and that there is this person you  
12 should know about?

13 A It could have been.

14 Q Could it have been a person who was arrested?

15 A It could have been.

16 Q But you have no recollection whatsoever; is that  
17 correct?

18 A Like I said, sir, it was eight years ago. I  
19 don't remember.

20 Q Now did the individual who is the informant, did  
21 that individual have anything to do with what you  
22 claim is my client's appearance on that street in the  
23 described vehicle?

24 A I don't understand your question, sir.

25 Q Did the informant in fact say that my client was

1 coming there to meet him?

2 A I don't remember the informant or the source. I  
3 couldn't tell you that. I don't remember any case  
4 where, while I was in the Flex Unit, that we did an  
5 operation like that.

6 Q Can you tell me whether or not the informant in  
7 fact made the phone call to have the individual come  
8 there?

9 A I seriously doubt that. At that level of Flex,  
10 we didn't do those types of operations. When I went  
11 to HIDTA, we did operations like that, but never in  
12 Flex, because the Flex Unit was a lower level than a  
13 drug unit. We were more focused on street violence  
14 and street crimes. We didn't work operations where  
15 people were set up in general, back eight years ago.

16 MR. CROWE: Just a moment, Your Honor.

17 I would like to have marked as Defendant Martin  
18 Motion Exhibit 1 a report which we received from the  
19 government with their Bates Number 421D.

20 THE COURT: All right. It will be marked. You  
21 hold onto it for now.

22 DEFENDANT MARTIN: Your Honor, can I review  
23 that? I'm not aware of that. May I read that?

24 MR. CROWE: Certainly.

25 THE COURT: I'm glad to see you participating,

1 Mr. Martin. You can't write on it, sir.

2 MR. CROWE: The judge said you can't write on  
3 it.

4 THE COURT: Thank you, marshal.

5 MR. CROWE: Actually, Your Honor, I have another  
6 copy. We will have the other copy marked.

7 (Defendant Martin's Motion Exhibit Number 1 was  
8 received.)

9 BY MR. CROWE:

10 Q Do you recognize that document?

11 A No, sir, I don't. I know what the document is,  
12 but that specific one, no.

13 Q You indicated that Detective, that Officer  
14 Hollingsworth was an individual at that time?

15 A Yes.

16 Q I will tell you that we received this document  
17 in a series of documents which we were told related to  
18 the arrest of my client on that day. Is it your  
19 reading of that document that at approximately 10:30  
20 on June 18th of 1999, that there was seized from 836  
21 Vine Street four razor blades with white powder  
22 residue, and the defendant's name was Charles Staton?

23 A That's what is written on here, yes, sir.

24 Q Was Charles Staton in fact the informant in that  
25 case, if you know?

1 A I have no idea, sir.

2 Q You have no idea whether the -- okay.

3 You have no idea whether the individual who gave  
4 you the information was or was not somebody in trouble  
5 with the criminal law; is that correct?

6 A He could have been, sir, but I don't know. I  
7 don't recall.

8 Q In fact, for all we know, that individual could  
9 be sitting in the courtroom today and you wouldn't  
10 know him or her; is that right?

11 A You are actually right, sir.

12 Q And you wouldn't even know whether it was a him  
13 or a her?

14 A You are absolutely right.

15 Q Now you testified about smelling the odor of  
16 marijuana as you approached the car; is that right?

17 A Yes, sir.

18 Q At the time that you approached the car, had it  
19 already been ordered to stop?

20 A Yes, we ordered it to stop.

21 Q Was this an investigative stop or was this for  
22 purposes of making an arrest?

23 A At that point?

24 Q Yes.

25 A Purposes for making an arrest.



1 Q Why were you making an arrest?

2 A Because at that point in my career, I had been  
3 involved in well over a thousand arrests. I've seen  
4 rerolled cigars, and when we stopped the car, we  
5 believed at that point he was smoking marijuana, which  
6 is still a violation of Maryland law.

7 Q But the stop was made before you smelled the  
8 odor again?

9 A It was when we observed him smoking the  
10 marijuana.

11 Q How far away from him were you when you  
12 initially observed him?

13 A He passed our car driving by. He made the  
14 left-hand turn onto Ashton Street.

15 Q What was the distance between you and him at the  
16 time the observation was made?

17 A At the closest point, five feet. At the  
18 furthest point, maybe 25 feet or 50.

19 Q Where were you located?

20 A In the driver's side of the vehicle, in the 300  
21 block of South Pulaski Street.

22 Q He was in the driver's side of the vehicle on  
23 the other side of South Pulaski Street?

24 A He was driving north. We were facing south.

25 Q You observed the cigar; is that correct?

1 A Correct.

2 Q What was it that you saw about the cigar which  
3 caused you, yourself, to determine that it was, that  
4 it was a rerolled cigar?

5 A Like I said, we've made numerous marijuana  
6 arrests, numerous arrests. I've seen rerolled cigars  
7 thousands of times.

8 Q What was it that you saw on this occasion which  
9 caused you to believe that it was a rerolled cigar, if  
10 you can recall?

11 A The way it was rolled.

12 Q Do you recall what you saw at the time?

13 A A rerolled cigar.

14 Q As you sit here today, can you actually, I mean  
15 do you actually have a picture in your mind of this  
16 cigar, or are you going by your report?

17 A I'm going by my report basically, a lot of it,  
18 but that's what I wrote at the time. That's what I  
19 observed at the time that day.

20 Q In fact, the truth is that you are going on your  
21 report for virtually everything that you said; is that  
22 correct?

23 A No, sir.

24 MR. CROWE: Can I have marked as Defendant's  
25 Exhibit 2, and we will submit this in a moment, Your

1 Honor, a copy of the officer's report which shows the  
2 government's Bates Numbers 409 and 410?

3 THE COURT: They are admitted.

4 (Defendant Martin's Motion Exhibit Number 2 was  
5 received.)

6 BY MR. CROWE:

7 Q Is that in fact the report that you wrote?

8 A Yes, sir.

9 Q Would you turn to the second page of that  
10 report? Does that indicate, "Upon stopping vehicle,  
11 we observed 30-1," which was the defendant, "smoking  
12 number one. 30-1 then placed number one on the floor,  
13 then placed number one on the floor between his legs."

14 A Yes.

15 Q Does that indicate that you didn't, that the  
16 first time that you observed the individual stopping,  
17 smoking what you described was a rerolled cigar was  
18 after you had stopped him?

19 A It wasn't after. We stopped him -- we saw him  
20 smoking it before we stopped.

21 Q Does the report say upon stopping vehicle, we  
22 observed 30-1 smoking?

23 A It's a very brief report. A more detailed  
24 report is in the statement of charges.

25 Q Again, does this report, which you relied on for

1 everything else, say that upon stopping vehicle, you  
2 observed the defendant smoking?

3 A I relied on the statement of charges, sir.

4 Q Pardon? Well, you have been testifying about  
5 your report. Again, can you just give me a yes or no  
6 answer?

7 Does your report say that it was upon stopping  
8 the vehicle that you observed the man smoking what you  
9 described as a rerolled cigar?

10 A It does say that. It doesn't mention prior to  
11 stopping the vehicle either.

12 MR. CROWE: Nothing further, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. HARDING:

15 Q Sergeant --

16 DEFENDANT MARTIN: Your Honor.

17 MR. HARDING: Oh, I'm sorry.

18 DEFENDANT MARTIN: I accept the attorney's offer  
19 for value, return it to him for value, request him to  
20 settle and close the accounts. I request -- I do not  
21 argue the facts. I request the judge to issue me an  
22 appearance bond, waive all public costs. I request  
23 you to settle and close all accounts, release the  
24 order to me immediately.

25 I request him, request the Court to set off and

1       adjust all public charges by exemption, in accord with  
2       Uniform Commercial Code 34-301, House Joint Resolution  
3       192, and Public Law 73-10. I request immediate  
4       discharge. I accept his offer for value and I return  
5       his offer to you for value.

6               THE COURT: Marshals, Mr. Martin is excused.

7               (Pause.)

8               Let the record reflect that Mr. Martin has  
9       indicated by his repeated disruptions that he wish not  
10      to be present. The Court could only anticipate that  
11      when Mr. Crowe rose to argue the motion, that there  
12      would be further disruptions by Mr. Martin, and his  
13      behavior here indicates that he has chosen not to  
14      participate through the balance of this hearing

15              You may proceed, Mr. Harding.

16              MR. HARDING: Thank you, Your Honor.

17      BY MR. HARDING:

18      Q       Your Honor, did I show you --

19              I'm sorry. Sergeant Willard, did I show you  
20      that chemist report previously, the one that Mr. Crowe  
21      just showed you and which is marked as defense  
22      exhibit, and bears Bates Stamp 421D?

23      A       Yes, sir.

24      Q       What did you conclude after seeing that  
25      document?

1 A In those days, when we had the Flex Unit, we  
2 were averaging well over 1500 arrests a year.  
3 Typically, in a day we would arrest ten people. One  
4 person was designated as the submitting person. They  
5 would write all the submissions and submit things.

6 But this doesn't look like anything that was  
7 even recovered from the report. It was common and  
8 typically happened that people wrote numbers down  
9 wrong when they did the submissions.

10 MR. HARDING: Let me also offer an exhibit.  
11 This is the Statement of Probable Cause and bears  
12 Bates Stamp Number 413 and 414.

13 THE COURT: It's admitted.

14 (Government's Motion Exhibit Number 2 was  
15 received.)

16 BY MR. HARDING:

17 Q Taking a look at this, Sergeant Willard, is this  
18 the Statement of Probable Cause that you swore out  
19 that day?

20 A Yes, sir, it is.

21 Q Let me call your attention to the sentence that  
22 begins your officer, with this information, and I just  
23 want you to read the next several sentences.

24 A Yes, sir.

25 MR. CROWE: Your Honor, would the Court note my

1 objection? This is an inadmissible prior consistent  
2 statement.

3 THE COURT: The objection is overruled.

4 THE WITNESS: Your officer, with this  
5 information --

6 THE COURT: Slowly, please, sergeant.

7 THE WITNESS: Your officer, with this  
8 information, went to the 300 block of South Pulaski  
9 Street and set up covert surveillance. While there,  
10 we observed a gold Ford Taurus station wagon drive  
11 into the area. This vehicle had Delaware temp tag of  
12 XY1257. Your officer also observed Mr. Martin was  
13 smoking what looked to be a rerolled cigar. Your  
14 officer knows that it is common -- that a common use  
15 for rerolled cigars is to smoke marijuana. Your  
16 officer, with this information and observation,  
17 stopped the vehicle as it turned onto the 200 block of  
18 South Smallwood Street.

19 BY MR. HARDING:

20 Q Why don't you just keep reading a couple lines.

21 A During the stop, as your officers approached the  
22 driver's side door of the vehicle, as your officers  
23 approached, we observed Mr. Martin placing an object  
24 between his legs on the floorboard of the vehicle. We  
25 could smell a strong odor of burnt marijuana. Your

1 officer asked Mr. Martin to step from the vehicle.

2 Your officer then recovered a half burnt rerolled  
3 cigar containing a green leafy substance, suspected  
4 marijuana.

5 Your officer also located, sticking from under  
6 the driver's seat of the vehicle, the butt of what was  
7 found to be a Hi-Point nine millimeter handgun, Serial  
8 Number P040255.

9 MR. HARDING: Thank you. That's good enough.

10 I believe that's all the questions I have for  
11 Sergeant Willard. As I say, I have one more exhibit.

12 THE COURT: Thank you, Sergeant Willard. I  
13 assume there are no further questions from counsel?

14 MR. CROWE: Just a couple, Your Honor.

15 THE COURT: All right, Mr. Crowe.

16 RE CROSS EXAMINATION

17 BY MR. CROWE:

18 Q Officer, as I understand it, you were in the 300  
19 block of South Pulaski Street; is that correct?

20 A When this started, yes, sir.

21 Q And when you saw the gold Taurus?

22 A Yes, sir.

23 Q How many lanes are there in that block of South  
24 Pulaski Street?

25 A One lane in each direction.



1 Q You were facing in which direction?

2 A I was facing southbound.

3 Q And the car was driving --

4 A Northbound.

5 Q -- northbound?

6 MR. CROWE: Thank you. That's all that I have,  
7 Your Honor.

8 THE COURT: Thank you very much, Sergeant  
9 Willard. You are excused.

10 Will you hand those documents to the clerk,  
11 please?

12 Do you have an exhibit, Mr. Harding?

13 MR. HARDING: Yes, Your Honor. This is RW-1.  
14 It is a copy of Mr. Martin's plea agreement in the  
15 federal case that resulted from this arrest, dated  
16 November 16, 1999. It is signed by Mr. Martin and his  
17 attorney, James Wyda, from the Federal Public  
18 Defender's Office.

19 Actually, the dates next to his signature on the  
20 last page are November 24, 1999. The November 16th  
21 date is on the front of the document.

22 I would ask the Court's permission to -- well, I  
23 offer into evidence, and I ask the Court's permission  
24 to permit me to read aloud the first paragraph of the  
25 factual stipulation.

1 THE COURT: It's admitted. You may.

2 (Government's Motion Exhibit RW-1 was received.)

3 MR. HARDING: On June 18, 1999, at approximately  
4 1:30 p.m., Baltimore City police officers responded to  
5 the 300 block of Pulaski Street, Baltimore, Maryland,  
6 in response to informant information that the driver  
7 of a particular vehicle may be in possession of a  
8 firearm.

9 During the surveillance of the defendant, Mr.  
10 Martin was observed in the area driving the described  
11 vehicle, a gold Ford Taurus. The officers stopped the  
12 car. At which time, Mr. Martin was asked to step out  
13 of the vehicle. At which time, the butt of a handgun  
14 found to be one Hi-Point nine millimeter semiautomatic  
15 handgun, Serial Number P040255 was observed under the  
16 driver's seat. The firearm was recovered and Mr.  
17 Martin was arrested.

18 There are a series of factual stipulations that  
19 follow in the document having to do with the serial  
20 number of the gun, the definition of firearm, the fact  
21 that it was in interstate commerce, and that he had a  
22 prior conviction. That's all, Your Honor.

23 THE COURT: Thank you, Mr. Harding. It's the  
24 government's burden, but I will hear you first, Mr.  
25 Crowe. I think I understand the government's theory.

1 MR. CROWE: Thank you, Your Honor.

2 I was, quite frankly, surprised at Detective  
3 Willard's recollection. It was not sparse, but  
4 probably non-existent. He had no -- he appeared to  
5 have absolutely no recollection of the facts  
6 concerning this case and was testifying, as I  
7 understood it, if not entirely, then virtually  
8 entirely from the basis of statements which he had  
9 made, which he had made at a previous time.

10 My recollection of the Rules of Evidence is that  
11 they are quite clear the police report is not a  
12 business report, and for that reason, we do not think  
13 that the search can be supported on the basis of, on  
14 the basis of the report itself.

15 In addition to that, there was not the standard  
16 examination that one would expect, which would be  
17 necessary to get this in as past recollection  
18 recorded.

19 THE COURT: You know, it occurred to me when I  
20 got Mr. Harding's letter, and particularly now that  
21 Mr. Harding has read into the record the stipulated  
22 facts, I'm not even sure we have to have a hearing.

23 MR. CROWE: Well, that's the second part.

24 THE COURT: I don't understand the law to be  
25 that in case one, a defendant can waive his rights to

1 challenge under the Fourth Amendment the admissibility  
2 of evidence, and then come along in case two, when  
3 that issue becomes important again, to have the  
4 defendant's right to challenge under the Fourth  
5 Amendment and apply the suppression remedy to be  
6 reinvigorated.

7 I mean it's an unusual kind of situation, and I  
8 haven't done any legal research, but I am not sure the  
9 stipulated facts wouldn't get the government exactly  
10 where it needs to get to.

11 MR. CROWE: I also, Your Honor, have not done  
12 any research on that point. It is my understanding  
13 that essentially a waiver of rights in one proceeding  
14 does not necessarily carry over to another proceeding.

15 THE COURT: That would be a peculiar application  
16 of the suppression remedy under the Supreme Court's  
17 evolving jurisprudence.

18 Anyway, go ahead. I understand the point.

19 MR. CROWE: I mean the only discovery we had  
20 gotten in this case was the officer's or the various  
21 reports from the officer, many of which have been  
22 referred to here. With simply those and his  
23 testimony, we don't believe this evidence comes in.

24 It's a warrantless arrest. It's the  
25 government's burden of proof in this matter, and we

1 don't believe that they have carried it.

2 THE COURT: All right. Thank you, Mr. Crowe.

3 I don't need to hear from you, Mr. Harding.

4 The facts and the law are quite self-evident.

5 Even assuming, from the point of view of Mr. Martin,  
6 that the Court had some doubt, which I don't, but even  
7 assuming that, as Mr. Crowe's questioning suggested,  
8 that the officer is mistaken, the detective is  
9 mistaken, that he didn't actually observed the  
10 rerolled cigar when Mr. Martin drove past him, I think  
11 there would still be adequate grounds, given the  
12 description of the vehicle, to make a traffic stop.

13 But I don't need to go to that point because I  
14 do credit the testimony of the detective that he  
15 observed the hand-rolled, rerolled cigar and  
16 reasonably concluded that there was a possibility,  
17 certainly sufficient to establish reasonable  
18 suspicion, that Mr. Martin was in possession of  
19 contraband and, therefore, the traffic stop was  
20 permissible.

21 Once the traffic stop was effected, and as he  
22 approached the vehicle, he could smell the odor of  
23 burning marijuana and, therefore, he had probable  
24 cause therefrom to effect an arrest of Mr. Martin  
25 and/or to search the vehicle, which Mr. Martin was the

1 operator.

2 The Court credits the witness's testimony that  
3 when Mr. Mitchell (sic.) came out of the vehicle and  
4 the officer properly went into the vehicle to search  
5 for what he believed to be a hand-rolled or a rerolled  
6 cigar containing contraband, he observed in plain view  
7 the butt of a weapon. Clearly, therefore, there was  
8 probable cause to believe that Mr. Martin was in  
9 violation of state law by transporting a handgun in a  
10 vehicle.

11 So for all these reasons, the stop and search of  
12 the vehicle comported with Fourth Amendment  
13 requirements, and the arrest of Mr. Martin was  
14 permissible.

15 But the Court also concludes, for what it's  
16 worth, that the stipulation in the federal prosecution  
17 of Mr. Martin did indeed effect a once-and-for-all  
18 waiver of his Fourth Amendment rights in respect to  
19 this particular stop, search and seizure.

20 Therefore, as an alternative basis of decision,  
21 the Court finds that Mr. Martin has knowingly,  
22 voluntarily and intelligently waived his right to  
23 invoke a suppression remedy in respect to the seizure  
24 of the handgun.

25 Anything further, Mr. Harding, on this?

1 MR. HARDING: No, Your Honor. Thank you.

2 THE COURT: All right. I believe the final  
3 issue is the issue of the motions to dismiss. Am I  
4 right? I think so. So I am happy to hear from  
5 counsel in any particular order you choose, unless you  
6 want to submit on the papers.

7 MR. COBURN: I'm ready to go if no one else is.

8 THE COURT: All right, Mr. Coburn. I'll hear  
9 from you.

10 MR. COBURN: Thank you, Your Honor.

11 The motion that I was hoping to argue, and, of  
12 course, I'll be brief, is the motion related to the  
13 Interstate Agreement on Detainers.

14 THE COURT: Okay.

15 MR. COBURN: The government has filed a fairly  
16 comprehensive response to this motion. The issues  
17 that I think continue to exist and that really, from  
18 my point of view at least, don't appear to be  
19 substantively addressed are as follows:

20 The government admits, generally speaking, how  
21 the IAD works. You know, of course, what we are  
22 focused on here is what is called the anti-shuttling  
23 provisions of the Interstate Agreement on Detainers,  
24 particularly Article IV of the IAD.

25 The government's position seems to be that after

1 the federal case, that is to say this case, started,  
2 that all that happened was that Mr. Gardner was kind  
3 of repeatedly transported to various county facilities  
4 typically for proceedings relating to the state  
5 proceeding that's focused on the Spence murder.

6 I don't think that the record is consistent with  
7 that proposition, at least as far as I can tell. I  
8 mean the government gives, provides kind of an  
9 interesting summary, and I think it's just a partial  
10 summary actually, of the number of the various  
11 transfers that occurred.

12 For example, the government says that on August  
13 4th --

14 THE COURT: Just a moment, please. Let me pull  
15 up the government's memorandum.

16 MR. COBURN: Absolutely, Your Honor. I know I  
17 have Mr. Hanlon's --

18 MR. HANLON: I have another copy of it, Your  
19 Honor.

20 THE COURT: -- master work. Yeah, here it is.

21 Go ahead, Mr. Coburn.

22 MR. COBURN: Thank you very much, Your Honor.

23 Directing your attention -- I can pretty much  
24 just calibrate my argument to what's written there in  
25 their memorandum.



1 I mean on page three of the memorandum, the  
2 government concedes that on August 4th --

3 Actually, I should start at the little bullet  
4 point above that.

5 From February 20, 2004 until August 4, 2004, the  
6 government concedes or says the defendant was held as  
7 a federal prisoner at the Maryland Correctional and  
8 Adjustment Center, MCAC.

9 Now the distinction that they are drawing in  
10 this submission, if I understand it, the notion that  
11 they are urging is that Mr. Gardner was never sent  
12 back to a Maryland Department of Corrections facility,  
13 and the cases that they are relying upon are cases in  
14 which typically, you know, a defendant is held in  
15 state custody, serving a sentence at a particular  
16 prison facility.

17 Then this defendant is sent to federal custody  
18 or is sent to federal detention to face a federal  
19 charge on a federal detainer, and when is sent back to  
20 state custody in a completely unrelated, like a third  
21 case, to the same state, that is to say, the sending  
22 state that the defendant originally came from, and  
23 typically held in like sort of a temporary jail, a  
24 temporary detention facility other than a facility  
25 that's a correctional facility or a prison facility,

1 at least not the same prison facility that the  
2 defendant came from originally.

3 So the government relies on a couple of cases.  
4 There is a recent 2007 case suggesting that that  
5 doesn't violate the IAD.

6 But here, the facts that we have here, at least  
7 as I see them, are materially different because here,  
8 the government concedes right in the first bullet  
9 point that the defendant is held from -- after this  
10 case, the case we are in right now commences.

11 From February 20, 2004 until August 4, 2004,  
12 they say he is held as a federal prisoner at the  
13 Maryland Correctional and Adjustment Center.

14 Now actually, I was just trying to do -- and I  
15 hope Your Honor will forgive me. I'm in trial, as  
16 Your Honor knows, down in D.C. So I just wasn't able  
17 to kind of scrutinize this issue as closely as I  
18 should have before this hearing. But I'm pretty sure  
19 that the MCAC is part of the Maryland Department of  
20 Corrections.

21 That's different from the cases that the  
22 government is relying on. In other words, he is not  
23 being sent, you know, to like the Frederick County  
24 Jail in order to face a new robbery charge in  
25 Frederick County or something like that. He is being

1 sent from whence he came.

2 In other words, he is initially serving a  
3 sentence in a Maryland Department of Corrections  
4 facility. He comes here and then he is sent back, at  
5 least as I think, if I'm figuring this out correctly,  
6 he is sent back to another Maryland Department of  
7 Corrections facility. I'm pretty sure MCAC is part of  
8 the Department of Corrections. I was actually just  
9 looking him up.

10 THE COURT: Of course, it is, but I'm not -- we  
11 don't have a federal detention facility.

12 MR. COBURN: And I know that's a subject of a  
13 lot of controversy in this district.

14 THE COURT: Actually, there's no controversy.  
15 We need one. We've got to have one.

16 MR. COBURN: I don't mean to disagree with that  
17 at all. I strongly agree with you.

18 THE COURT: Yeah.

19 MR. COBURN: But I mean as a result then of just  
20 sort of the fortuity, the chance that there isn't one,  
21 he then comes back, not to a county jail, but he comes  
22 back to a Maryland State Department of Corrections  
23 facility.

24 THE COURT: But he is in federal custody.

25 MR. COBURN: Now I hear that. That's certainly

1 the government's position with respect to that  
2 particular, that particular moment.

3 THE COURT: Right.

4 MR. COBURN: But A, if I understand correctly,  
5 there's a contract between the federal government  
6 and --

7 THE COURT: The State of Maryland.

8 MR. COBURN: -- the State of Maryland. It may  
9 be State of Maryland or, according to --

10 Actually, there is a Wikipedia write-up on the  
11 MCAC, believe it or not, Your Honor, and it says the  
12 contract is with the MCAC specifically.

13 THE COURT: Which is an agency, department of  
14 the State of Maryland.

15 MR. COBURN: Now the government, you know, they  
16 haven't proffered a copy of this contract. I haven't  
17 seen it. I mean I sort of take their word, I suppose,  
18 that the contract exists.

19 But I don't think that takes, with respect to  
20 even that particular transfer, I don't think it takes  
21 that out of the IAD. In other words, he is not being  
22 transferred to sort of some other facility. He is not  
23 being transferred, let's say, to, you know, a state  
24 facility in a third state that has this contract. He  
25 is being transferred, at least as I see it, directly

1 in violation of the IAD, back to the Maryland  
2 Department of Corrections, and I don't think the  
3 existence of that contract changes that situation at  
4 all. I don't think it does.

5 Now they are citing some cases relating to  
6 transfers to other places, not relating to transfer  
7 back to the sending jurisdiction of the Department of  
8 Corrections, you know, for this proposition that he  
9 sort of remains in federal custody because of the  
10 existence of these contracts.

11 A, you know, I'm not at all sure those cases, to  
12 the extent they exist, are correct because I mean --

13 THE COURT: Okay. But -- all right.

14 MR. COBURN: I mean you have to -- I'm sorry. I  
15 didn't mean to interrupt, Your Honor.

16 THE COURT: I'm just trying to understand your  
17 position, and maybe I should hear from Mr. Hanlon  
18 first. Would that be helpful to you?

19 MR. COBURN: It would be perfectly fine with me  
20 if it's helpful to the Court, but I mean from my point  
21 of view, you know, this is a direct and unambiguous  
22 violation of the IAD because he is being sent back to  
23 the same agency within the sending state. You know,  
24 contract or no contract, that's where he is going.

25 THE COURT: Let's hear from Mr. Hanlon and then

1       you respond to the government's argument.

2               MR. COBURN: I appreciate that, Your Honor.

3               DEFENDANT GARDNER: Excuse me, sir. I accept  
4 everything for value that the attorney said, return it  
5 for full value. I do not wish to argue the facts. I  
6 request the judge to issue me an appearance bond, and  
7 waive all public costs. I request the judge to close  
8 the accounts and release the order of the Court to me  
9 immediately. I request the judge to set off and  
10 adjust all public charges by exemption, in accord with  
11 U.C.C. 3-419, House Joint Resolution 192, and Public  
12 Law 73-10, and I request discharge.

13              THE COURT: You are discharged, Mr. Gardner.  
14 Mr. Gardner is excused. Thank you, marshal.

15              (Pause.)

16              Okay, Mr. Hanlon.

17              MR. HANLON: Thank you.

18              THE COURT: Walk us through it.

19              MR. HANLON: Certainly. What I did, in  
20 attempting to brief this issue, I had to begin by sort  
21 of reconstructing what the defendant's sort of  
22 custodial status had been. The defendant's motion had  
23 attached various documentation dealing with the fact  
24 that he was shifted here and there. It basically said  
25 this is in violation of the IAD, and that was about

1 it. Then we had Mr. Gardner's own written submission.

2 So I relied on that and then I obtained  
3 documentation from the marshals and essentially put  
4 together the chronology that we have and that I put in  
5 the memorandum.

6 I looked at it in terms of sort of two  
7 categories of transfers, and the categories were based  
8 on whether or not it was a situation where the  
9 defendant is being housed in a state facility as a  
10 federal prisoner or a situation where the defendant  
11 was being placed in a state facility as a state  
12 prisoner. So it was the Baltimore County situation on  
13 the one hand and then sort of all the other situations  
14 on the other.

15 They were different situations, and it is true,  
16 he was always being held in a state facility, because  
17 that's how we do things here in the federal courts in  
18 Maryland because we have no facility.

19 A number of decisions, including the Hunnewell  
20 decision which I cite in my brief, have essentially  
21 stated that it is clear under the IAD, and this  
22 appears to be uniform -- I found no Fourth Circuit  
23 law, but it appears to be uniform -- that the  
24 formality of treating a prisoner as a federal  
25 prisoner, whether he is being housed in a state

1 facility or not, simply takes it out of the IAD. That  
2 prisoner has not been transferred back to the original  
3 place of imprisonment or even the sending state in a  
4 way that would violate the IAD.

5 Frankly, that was the easier problem. The  
6 Baltimore County issue was I thought a bit more  
7 complicated because there you actually have a transfer  
8 to the sending state.

9 But focusing first on the issues that I think  
10 Mr. Coburn focused on a moment ago, during the time  
11 that Mr. Gardner was held as a federal prisoner at the  
12 state facilities, all of the case law makes clear, it  
13 doesn't matter where you go. It doesn't matter what  
14 facility you are at. If you are treated as a federal  
15 prisoner, if you are credited federal time, then you  
16 are in federal custody. There has been no transfer  
17 back to the sending state.

18 It appears the way the cases have dealt with it,  
19 including the First Circuit in Hunnewell, is that the  
20 term sending state means you are within the sovereign  
21 custody of the state. In this case, it would be the  
22 State of Maryland.

23 That wasn't the case here, with the exception of  
24 the Baltimore County transfers. Mr. Gardner was a  
25 federal prisoner. He was getting credit accounted to



1 him by the marshals. The marshals are counting his  
2 days as federal time, as indicated in that prisoner  
3 transfer log. He was brought to court if he needed to  
4 be brought to court on the basis of a come-up, not on  
5 the basis of a federal writ issued to a state judge.

6 THE COURT: There has never been a federal writ  
7 issued for Mr. Gardner, has there?

8 MR. HANLON: Not to the best of my knowledge,  
9 with the exception I think with the original one that  
10 brought him to court in the first place where he  
11 invoked his IAD rights. Then subsequently, he did  
12 waive his IAD rights later on. I don't know what his  
13 history has been after that because I don't really  
14 think that's in controversy here.

15 But during the issues that we are dealing with,  
16 no, there were no federal writs. He was brought in  
17 and then he remained a federal prisoner, with the  
18 exception of the times when he was held in Baltimore  
19 County custody on the basis of a state writ.

20 So the government's answer to this first point  
21 dealing with his housing in state facilities is there  
22 is no IAD violation because he was never sent back to  
23 the sending state. If he were, I guess we are  
24 violating the IAD with all of our prisoners who invoke  
25 the Interstate Agreement on Detainers. Of course,

1 that's now how all of the federal courts that have  
2 looked at this have addressed the issue.

3 Now that's the first category. The other  
4 category are the Baltimore County situations and  
5 again, that seems to be squarely addressed again in  
6 the Hunnewell decision and also in, I believe it's the  
7 Pursley decision, which arose out of Colorado I  
8 believe.

9 Again, both of those cases are dealing with  
10 exactly the same situation we have here, both of them  
11 reaching the same result that the government urges  
12 here. A state prisoner, a state prisoner in sentence  
13 is transferred to federal court on a new charge. He  
14 is then picked up on a state writ or a state transfer  
15 order to another state jurisdiction for a new state  
16 charge, and that is simply not a violation of the IAD  
17 because he is not being returned to his original place  
18 of imprisonment pursuant to Article V.

19 Those are the two prongs that have to be shown  
20 if there is a violation of the anti-shuttling  
21 provision. There needs to be a return to the original  
22 place of imprisonment and that return has to be done  
23 pursuant to Article V of the IAD, which contemplates a  
24 return of a prisoner to serve his state sentence and  
25 return to rehabilitation after the conclusion or

1 during, if it's a violation of the ongoing current  
2 case.

3 The fact is that at no time during Mr. Gardner's  
4 federal incarceration, from the day of his initial  
5 appearance until the day that he made his reserved  
6 waiver of rights under the AID, was he ever returned  
7 to a DOC facility in a way that he resumed his state  
8 sentence and entered back into rehabilitation.  
9 Therefore, there has been no violation of the IAD.

10 THE COURT: All right. Thank you, Mr. Hanlon.

11 MR. HANLON: Thank you, Your Honor.

12 THE COURT: All right. I hope that was helpful,  
13 Mr. Coburn.

14 MR. COBURN: Absolutely, Your Honor. I think it  
15 helped to sharpen the issues and, you know, I will try  
16 to address them directly, to the extent that I can.

17 First of all, he spoke of a waiver, and I hope  
18 it's clear from the paperwork, and I am sure the  
19 prosecutor didn't mean to suggest anything to the  
20 contrary, that the waiver is only prospective.

21 THE COURT: Right, April 14, 2005.

22 MR. COBURN: Exactly. So we are only talking  
23 about -- you know, there is no waiver with respect to  
24 prior to that date, and there is a federal detainer  
25 prior to that date. So the IAD is squarely set up

1 here, at least as I understand it.

2 So with respect to that first -- again, I'm not  
3 going to detain Your Honor long on this.

4 But with respect to that first bullet point in  
5 terms of the MCAC custody, what you typically have, at  
6 least as I understand it with respect to the cases on  
7 which the government relies, is a situation in which  
8 let's say, you know, there is a county facility  
9 somewhere that has like a block set aside for federal  
10 prisoners. And the argument is made, and I don't know  
11 how, you know, carefully it has ever been vetted,  
12 frankly, but the argument typically is made to the  
13 effect that those prisoners in the federal block in  
14 the county facility are, for IAD purposes or other  
15 purposes, they are still in "federal custody."

16 But here, Your Honor, you have a situation in  
17 which my client is sitting for several months at the  
18 MCAC.

19 THE COURT: In a federal cell.

20 MR. COBURN: But he is not in federal custody.  
21 There may be a contract, you know, which is a piece of  
22 paper. That's fine. You know, I'm sure it regulates  
23 where the funding comes from and so on, but he is  
24 supervised by state people.

25 THE COURT: What dates are you saying he was not

1 in federal custody?

2 MR. COBURN: At least as I understand it, Your  
3 Honor, he is not in federal custody from February 20,  
4 2004 until August 4, 2004. It says that he is held --  
5 this is just a conclusory allegation by the  
6 government. It says he is held as a "federal  
7 prisoner" at the Maryland Correctional and Adjustment  
8 Center.

9 Now that's what they -- you know, that's just  
10 putting a label on it.

11 THE COURT: Well, what kind of label do you put  
12 on it?

13 MR. COBURN: The label I put on it, Your Honor,  
14 is that he is being held at a state facility.

15 THE COURT: Slow down. That's not disputed. He  
16 is in a state-owned facility.

17 MR. COBURN: He is being supervised, regulated,  
18 controlled by state personnel in a state facility.

19 THE COURT: Who are acting for those purposes as  
20 agents of the United States Marshal Service.

21 MR. COBURN: I don't know that, Your Honor.

22 THE COURT: Well, I'm telling you that.

23 MR. COBURN: I mean --

24 THE COURT: That's what they do.

25 MR. COBURN: Well, I don't know that --

1 THE COURT: They don't have federal employees  
2 over there doing feedup at Supermax. They are state  
3 employees.

4 MR. COBURN: That's exactly my point.

5 THE COURT: But the United States government  
6 pays for those meals.

7 MR. COBURN: That's true. The United States  
8 government pays for the meals and the United States  
9 government I suspect, pursuant to the contract that I  
10 am sure exists between the U.S. government and the  
11 Maryland Department of Corrections, you know, pays  
12 some sort of proportionate share of the salary and the  
13 other overhead expenses that the institution incurs.

14 THE COURT: Actually, I think it's a per diem.

15 MR. COBURN: That would be easier, I mean a per  
16 diem, but it's still being done by state people in a  
17 state facility that is part of the Maryland Department  
18 of Corrections.

19 I don't think, if you look at the language of  
20 the IAD and you look at the particular cases that they  
21 cite, I don't think that that takes this out of the  
22 ambit of the IAD, not for one minute. I don't think  
23 it does.

24 THE COURT: Okay. I'll take another look at it.  
25 I don't think you are going to persuade me. I'll take

1 another look at it.

2 MR. COBURN: That's the feeling I am getting  
3 also, Your Honor.

4 There is one other thing which I should bring to  
5 Your Honor's attention.

6 THE COURT: What's that?

7 MR. COBURN: You know, there is some very  
8 careful phraseology in this submission. I mean he is  
9 taken to the Northern Neck Regional Jail in Virginia.  
10 That is not an IAD violation, I concede, because  
11 that's not the sending jurisdiction.

12 But right after that, they point out, they  
13 say -- this is on page five of their submission --  
14 between March 24, 2005 and April 11, 2005 -- and this  
15 is, like I say, this is carefully written -- the  
16 Defendant was housed for 18 days --

17 And I know, Your Honor, this sounds just  
18 hypertechnical.

19 THE COURT: It is hypertechnical. That's what  
20 we all get paid to do.

21 MR. COBURN: It's a bizarre piece of  
22 legislation, I concede to you, Your Honor.

23 When I was an Assistant U.S. Attorney in D.C.,  
24 we had a serial rape case that was dismissed with  
25 prejudice because of a one-day violation of the

1 Interstate Agreement on Detainers. I think it was  
2 probably the hardest thing that judge ever did.

3 THE COURT: Did he get reversed?

4 MR. COBURN: No, he didn't.

5 THE COURT: Did the government appeal?

6 MR. COBURN: The defendant was discharged.

7 THE COURT: Did the government appeal?

8 MR. COBURN: I don't believe they did. It was a  
9 serial rapist.

10 THE COURT: Well, an alleged serial rapist.

11 MR. COBURN: And he will always remain alleged.

12 THE COURT: All right.

13 MR. COBURN: But here we have on page five --

14 THE COURT: It's the same argument, Mr. Coburn.  
15 Whether it's the Maryland Adjustment and Training  
16 Center or the Allegany, what difference does it make?

17 MR. COBURN: Here's the difference.

18 THE COURT: What's the difference?

19 MR. COBURN: Because according to the  
20 phraseology here, do you see the way they say --

21 I have to say, Your Honor, I haven't scrutinized  
22 the internal paperwork of the Allegany County  
23 Detention Center, but it says again, the USMS  
24 considered him a federal prisoner during that time.

25 I would wager --



1 THE COURT: He is a federal detainee.

2 MR. COBURN: I would wager that there is no  
3 contract with respect to that institution.

4 THE COURT: You're going to lose a lot of money.  
5 We've got takers over here.

6 MR. SULLIVAN: I'll take him.

7 THE COURT: We'll all take that bet.

8 MR. COBURN: Really?

9 THE COURT: You think that Allegany County, out  
10 of the goodness of its heart, says U.S. marshals,  
11 bring us your downtrodden, your --

12 MR. COBURN: There may be some other  
13 methodology, Your Honor. There may have been a  
14 contract later or something, but I don't think they  
15 would have said considered him.

16 The fact that the U.S. Marshal Service considers  
17 somebody a federal prisoner is meaningless. It means  
18 nothing from the point of view of the IAD.

19 THE COURT: On that, I can agree with you. Mr.  
20 Hanlon, I'm sure, probably would draft that a little  
21 differently.

22 But you're right. It's not what the U.S.  
23 marshals consider him to be. It is what he is in law  
24 and in fact, and he is being held by the United States  
25 Marshal under Judge Grimm's order, plain and simple.

1 They can ship him to California. They can ship him to  
2 Oklahoma, state or federal. They can leave him here  
3 overnight. It doesn't make any difference, it seems  
4 to me. That's the only common sense interpretation.

5 But I'll take another look at it, Mr. Coburn.  
6 They may be, there may be something there.

7 MR. COBURN: I guess the main point from my  
8 point of view, I think in terms of if it is viewed  
9 through the prism of common sense, the statute really  
10 makes very little sense.

11 But I don't think it is a common sense  
12 proposition. I think it is a technical, a highly  
13 technical proposition. From our point of view, it  
14 seems to me it has just been violated.

15 THE COURT: Okay. You understand, of course,  
16 there wouldn't be a dismissal with prejudice in this  
17 case under any circumstance.

18 MR. COBURN: You know, Your Honor could exercise  
19 your discretion and dismiss this case with prejudice  
20 for the following reason.

21 THE COURT: I'm going to stop you. Now you are  
22 really --

23 MR. COBURN: Have gone too far.

24 THE COURT: -- going too far, yes.

25 While you are up there, did you want to argue on

1 the third superseding indictment? Do you have any  
2 issues on that?

3 MR. COBURN: I don't think we do, Your Honor.

4 THE COURT: Okay. Does anybody? You can submit  
5 on the papers if you want or I'll be glad to hear some  
6 brief argument.

7 Good afternoon again.

8 MR. HURSON: Thank you, Your Honor.

9 The papers have laid it out, and I think it has  
10 been tossed around as -- the government has labeled it  
11 a proof issue. What's at issue here is the amendment  
12 to the -- it's really just a small amendment, but  
13 large in the sense that it extends the date of this  
14 alleged RICO conspiracy two years.

15 It doesn't add any new racketeering acts, but it  
16 does change the purpose of the so-called Mitchell  
17 organization to preventing and obstructing arrests and  
18 prosecution through witness intimidation and disruption.

19 THE COURT: The part that I liked was your  
20 suggestion that maybe I need to recuse.

21 MR. HURSON: Well, Your Honor, I guess we jump  
22 right into the proof part.

23 THE COURT: I don't think the governments needs  
24 me as a witness.

25 MR. HURSON: Well, Your Honor, it is sort of

1 uncharted waters, I think it has been described as.  
2 It's in-court behavior. Now it has been labeled as  
3 disruption; but frankly, as a former middle school  
4 teacher, I have seen disruption, and it's relatively  
5 tame, if you ask me.

6 THE COURT: I'm afraid I don't have the option  
7 of a time-out.

8 MR. HURSON: None of my students cared either;  
9 hence, I'm here. But either way, the Fourth Circuit  
10 just a few weeks ago had a case before it, U.S. v.  
11 Banks, where the same flesh and blood argument was  
12 presented.

13 THE COURT: There have been a couple, yes.

14 MR. HURSON: Actually, I think the Fourth  
15 Circuit, to my knowledge, went as far as ever in  
16 describing it in this particular case. They called it  
17 an ill-advised self-defeating legal strategy, which  
18 perhaps is correct.

19 But the point is that this third superseding  
20 indictments seems to criminalize what it is albeit a  
21 strange, bizarre, what have you, but a legal argument.  
22 And to do that, we have entered into a really strange  
23 world, which I think is what you are alluding to,  
24 where we all become in some sense co-conspirators to  
25 criminal acts every time we come into the courtroom.

1 THE COURT: Well, no, not co-conspirators. You  
2 certainly become witnesses of disruptive behavior  
3 which the government contends, and the Grand Jury  
4 agreed, was evidence of an ongoing conspiratorial  
5 understanding.

6 MR. HURSON: Well, that certainly raises another  
7 issue that I think --

8 What was presented to the Grand Jury? What  
9 witnesses came forward? How was this even proven?  
10 The point of all this --

11 THE COURT: It would haven't taken much beyond  
12 reading the transcripts of the proceedings.

13 MR. HURSON: Perhaps, but at trial --

14 The point I guess, Your Honor, is to say at what  
15 point can we just narrow this down, cut the fat, and  
16 get to what this case is really about? It can't  
17 extend the life of a conspiracy for two years.

18 I mean in some sense it is a proof discussion.  
19 But you have defendants who are cooperative at a point  
20 and then, you know, cease cooperating. To reindict  
21 that and claim that it somehow stretches into the  
22 future, are we to expect I guess a fourth superseding  
23 indictment after today's proceedings? This goes on  
24 and on and on.

25 So you can call it a proof issue, you can call

1       it a pleading issue, but the point is the Court should  
2       step in and say enough is enough, limit this to what  
3       is really the issue here, and that is the supposed  
4       drug organization, and cut the flesh and blood out of  
5       it. That's what in essence we are asking the Court to  
6       do.

7               To the point that you made, whether or not you  
8       would be a witness, I mean it was in there, some  
9       argument over this, but as I read it, it was your  
10      suggestion, albeit maybe not -- you didn't expect it  
11      to be carried out, I don't know, but it was in the  
12      transcript where you said you know, I can actually  
13      envision a third superseding indictment.

14             THE COURT: And I think every one of us could.

15             MR. HURSON: Well, certainly now.

16             THE COURT: I mean it was as clear as the nose  
17      on our faces.

18             MR. HURSON: Well, I wasn't here at the time, of  
19      course. I would think that the behavior that was  
20      being exhibited here is an ill-advised legal strategy,  
21      and to turn that into evidence or a component of a  
22      criminal charge is a very dangerous direction. When  
23      we are talking about --

24             THE COURT: See, I don't think, I don't think it  
25      is any more a legal strategy than murder is a legal

1 strategy. I say that most respectfully. The Fourth  
2 Circuit was being, I was going to say  
3 uncharacteristically generous, but I won't say that.

4 The Fourth Circuit called it a "legal strategy,"  
5 right? It's not a legal strategy. It's not a legal  
6 strategy other than it's just the most expansive  
7 colloquial sense of that term one can imagine.

8 MR. HURSON: Certainly, perhaps not to us, but I  
9 do know that we may be hearing more about it as we are  
10 learning more about what it is and its genesis, and  
11 this and that, and I don't want to give it any more  
12 respect than it deserves.

13 But my point is it is a strategy, and if these  
14 gentlemen presenting it together somehow turns it into  
15 part of a criminalism, then four co-defendants saying  
16 not guilty can just as easily be turned into some sort  
17 of collected behavior designed to thwart the ends of  
18 the justice system.

19 So by that, I would say that is generally our  
20 issue. If anything, this is a separate, just one  
21 final point, a separate conspiracy, if you even want  
22 to go that far, whereby it would be perhaps a cover-up  
23 or some sort of disruptive -- but it can't be part of  
24 the initial drug organization. That's really our  
25 issue.

1 THE COURT: Thank you, Mr. Hurson.

2 MR. HURSON: Thank you.

3 THE COURT: I will certainly anticipate various  
4 motions in limine from the defense as we go forward,  
5 and I will give those motions careful consideration,  
6 to be sure, but I don't have within the Court's power  
7 to start amending indictments and making pretrial  
8 rulings on the scope of a conspiracy. We are just  
9 going to have to see how this plays out.

10 Yes, Mr. Crowe. I didn't mean to shortcut your  
11 argument on your motion to dismiss.

12 MR. CROWE: I will make it extraordinarily  
13 brief. I believe Mr. Hurson has certainly covered the  
14 high points and I think we have briefed it as well as  
15 we can in our second set of motions. I would just  
16 like to point out a couple of important dates for  
17 this.

18 June 7, 2002 we think is probably the critical  
19 date. That is the date of the last murder, the Tanya  
20 Jones-Spence murder. Mr. Harris was arrested for that  
21 murder that day.

22 My client and Mr. Mitchell had been in jail  
23 since April of 2002. So by that time, we had three of  
24 the four people who were named as members of the RICO  
25 enterprise and three of the four people who were part



1 of, who were named as members of the conspiracy in  
2 jail.

3 As Mr. Hurson has pointed out, that is also the  
4 date, even through the third superseding indictment,  
5 of the last racketeering act, and we only have a  
6 couple of crimes past that point. One is -- excuse  
7 me.

8 The arrest of Mr. Harris, he was actually in  
9 2004. He had a gun on him. Then there was the  
10 assault up in the Marshal's Office.

11 None of those were pled to be part of the  
12 conspiracy. None of those were pled to be part of the  
13 RICO enterprise.

14 Clients were in jail for months under the state  
15 indictment. They were in jail for about a year and a  
16 half under the federal indictment.

17 This Court made the formal finding itself that  
18 at all times they conducted themselves properly and  
19 they acted in a completely decorous manner while they  
20 were in court until the activity, the outburst,  
21 whatever you want to call it, in November of 2005.

22 The law is quite clear that for there to be a  
23 RICO enterprise, it has to be something that is  
24 continuing and ongoing. It can't be something which  
25 is punctuated by a lapse of -- actually, years is what

1 we are talking about here.

2 We don't think it's an ongoing activity. Under  
3 the cases we cited, we don't think that it is an  
4 ongoing activity in terms of being a RICO enterprise  
5 or in terms of being a garden variety conspiracy.

6 THE COURT: All right. Thank you, Mr. Crowe.

7 Mr. Harding.

8 MR. HARDING: Thank you, Your Honor.

9 Judge, in my response to this motion about when  
10 the conspiracy or the racketeering enterprise ends, I  
11 talked mostly about RICO cases, the Shores case and  
12 the Stokes case and other similar cases.

13 There's another line of authority which I think  
14 can be applied to this, and has been by the Fourth  
15 Circuit, and that's the case law dealing with  
16 withdrawal from a conspiracy.

17 I agree with Mr. Martin that the issue of when  
18 an enterprise ends is largely the same as the question  
19 of when a conspiracy ends. Of course, that's  
20 especially the case when what we have charged is a  
21 RICO conspiracy.

22 There is a section -- Section 170 of the Fourth  
23 Circuit Criminal Handbook summarizes the case law on  
24 withdrawal from a conspiracy. It talks about the rule  
25 in this circuit. I'll give you the Leavis case, 853

1 F.2d at 218-219. The rule applies in this circuit  
2 that a conspiracy continues until there is affirmative  
3 evidence of its abandonment or defeat of its purpose.

4 For withdrawal from a conspiracy, a particular  
5 member has to take affirmative steps to defeat the  
6 conspiracy, and it is his burden to show that he has  
7 done that.

8 There is a particularly good case that I pulled  
9 up in this line of cases about withdrawal from a  
10 conspiracy. It's the West case, and it is good  
11 because it deals with being incarcerated or getting  
12 locked up as an argument for withdrawing from a  
13 conspiracy.

14 This case, United States versus West, which is  
15 at 877 F.2d 281, dealt with a situation where a guy  
16 named Thomas was locked up in January of, I'm sorry,  
17 in May of 1986, and about seven or eight months later,  
18 in January of 1987, two of his co-conspirators were  
19 caught doing a marijuana transaction in Bermuda. Mr.  
20 Thomas claimed that he wasn't a member of the  
21 conspiracy, that evidence shouldn't be admissible  
22 against him.

23 The Fourth Circuit says in the West case, Thomas  
24 argues instead that his arrest constituted evidence of  
25 his withdrawal from the conspiracy and, therefore, the

1 post-arrest evidence should not have been admissible,  
2 absent an affirmative showing that Thomas somehow  
3 continued in his role as a conspirator from jail. We  
4 disagree. A defendant's membership in a conspiracy is  
5 presumed to continue until he withdraws from the  
6 conspiracy by affirmative action. Withdrawal must be  
7 shown by evidence that the defendant acted to defeat  
8 or disavow the purposes of the conspiracy.

9 It goes on to say that the District Court  
10 determined that the post-arrest evidence was relevant  
11 on the basis of the government's uncontested  
12 representation that two of the participants in the  
13 January 1987 marijuana transaction were  
14 co-conspirators with Thomas prior to his arrest.  
15 Given this presumption that Thomas's membership in the  
16 conspiracy, if proven, continued after his arrest,  
17 evidence of that transaction was relevant to proving  
18 the scope of the conspiracy's activities. We,  
19 therefore, find that the evidence was properly  
20 admitted.

21 There are similar provisions in a number of  
22 Fourth Circuit cases that deal with this issue.

23 I would also like to speak, and I'll rely on my  
24 written submission that I provided to the Court for  
25 the argument as it relates to a RICO enterprise, which

1 is very similar case law actually.

2 I want to say one thing about the courtroom  
3 disruption activity of these defendants, Your Honor.  
4 It is not charged in the RICO count. It is, however,  
5 racketeering activity because Section 1503 of Title 18  
6 of the U.S. Code is listed as racketeering activity in  
7 Section 1961. Section 1503 is a sort of federal  
8 contempt and obstruction of justice statute. It  
9 contains a sort of catchall provision.

10 There is a case, a United States Supreme Court  
11 case called U.S. v. Aguilar, 515 U.S. 593. At page  
12 598 it talks about this omnibus clause in 1503, and  
13 says that it serves as a catchall, prohibiting persons  
14 from endeavoring to influence, obstruct, or impede the  
15 due administration of justice. The latter clause, it  
16 can be seen, is far more general in scope than the  
17 earlier clauses of the statute.

18 The clause basically makes it a crime to  
19 corruptly influence, obstruct or impede or endeavor to  
20 influence, obstruct or impede the administration of  
21 justice, corruptly, which is a word, I believe it was  
22 Mr. Martin's motion, talks about.

23 There is an abundance of case law that simply  
24 says this is a specific intent requirement. It  
25 requires that the defendant specifically intend to

1       disrupt the administration of justice.

2               I'll give the Court another case, United States  
3 versus Alwan from the Fifth Circuit, a 2004 case, 388  
4 F. 3d 507, where its talks about a witness's failure  
5 to testify, his refusal to testify after being  
6 subpoenaed to court, which would be a classic example  
7 of contempt of court. It holds that that kind of  
8 activity is cognizable under the catchall provision of  
9 1503.

10              There is a string of case citations in the U.S.  
11 Code Annotated that speaks of this as a contempt  
12 provision.

13              So even though it's not charged, the courtroom  
14 disruption activity is racketeering activity under the  
15 law and would be admissible to show the pattern of  
16 racketeering activity in this case.

17              I had proposed to address that issue in writing,  
18 Your Honor, and I will do so, but I want to give you  
19 the government's position on that now.

20              The key point of that is the government doesn't  
21 say anything about live flesh and blood or the  
22 defendants' defenses, legal defenses in its third  
23 superseding indictment. It simply cites courtroom  
24 disruption, along with witness intimidation, as two of  
25 the purposes of the Mitchell organization, and witness

1 intimidation has in fact always been there in the  
2 indictment. It is one of the ongoing permanent  
3 features of this organization, and Your Honor got a  
4 flavor of it in the rap song that was played in court  
5 here one day.

6 But there are other instances. It's not just  
7 Mr. Harris who has attempted to assault or intimidate  
8 government witnesses. The Court will hear evidence of  
9 other such occasions that have punctuated the  
10 post-arrest history of this case. It's not jut Mr.  
11 Harris. It's other defendants as well, and it is an  
12 ongoing permanent feature of the organization.

13 So the government's position is that the new  
14 language that was inserted into the third superseding  
15 indictment is perfectly appropriate, proper language  
16 in the indictment and doesn't compromise any rights  
17 that the defendants have. Thank you.

18 THE COURT: Thank you, Mr. Harding.

19 Well, I am not persuaded to dismiss the  
20 indictment on account of the changes effected in the  
21 third superseding indictment. So the motions to  
22 dismiss or to strike certain language from the  
23 indictment is denied.

24 I will take another look at this IAD issue.  
25 It's kind of interesting actually, but I don't expect

1 to grant any relief to Mr. Gardner on account of that  
2 motion.

3 I think that -- yes, Mr. Hurson.

4 MR. HURSON: Not to interrupt, we have a  
5 separate motion to dismiss as well.

6 THE COURT: Oh, okay.

7 MR. HURSON: Not simply this one.

8 THE COURT: All right.

9 MR. HURSON: I can briefly summarize. This  
10 will, actually will be brief I think.

11 The papers pretty much lay it all out. It's the  
12 motion to dismiss. It was Count 1 of the second  
13 superseding indictment. I guess I would orally amend  
14 to make it the third superseding indictment. It's the  
15 whole issue of the separation between the person and  
16 the enterprise under 1962(c).

17 Again, the papers sum it up pretty well. I just  
18 wanted to draw attention to a couple interesting  
19 things.

20 One was Mr. Harding's representation in the  
21 courtroom today about how the fact that no one would  
22 have ever even called this an organization, the  
23 Mitchell organization. I thought that probative of  
24 the issue because our point all along is that there is  
25 no separation here between the individuals and what is



1 now being called a RICO organization. As the papers  
2 make clear, the Fourth Circuit has been very specific  
3 on the requirement that this be separate.

4 I was trying to think of an example that may sum  
5 it up, and something that came to mind was like a  
6 baseball team. The 1941 New York Yankees -- some  
7 might call them a criminal organization of sorts --  
8 would be different if they didn't have Joe Dimaggio on  
9 the team, but they would still be an organization.  
10 They would still continue on.

11 So in that sense, there is separation between  
12 the individual, albeit a key individual, but an  
13 organization.

14 Here, we have an organization, but if you take  
15 any one of the defendants out of it, it simply falls  
16 apart. It is not what the government claims that it  
17 is, a long-standing organized enterprise.

18 The case law is laid out clear in the briefs,  
19 but I just wanted to draw attention to that.

20 THE COURT: Okay. Thank you. I'll take another  
21 look at that. I'm aware that that is an issue that  
22 has been raised by Mr. Harris and I believe joined in  
23 at least by Mr. Gardner and perhaps by the other  
24 defendants as well.

25 All right. I appreciate counsel's efficient

1 presentation of your arguments today. We don't need  
2 to be in session tomorrow. We are next scheduled for  
3 May 10 and 11, and I believe that's when you wish to  
4 do the identification.

5 MR. KURLAND: Yes. I have a couple of  
6 procedural housekeeping matters that I would like to  
7 address with the Court.

8 THE COURT: Okay.

9 DEFENDANT MITCHELL: Excuse me, Your Honor.  
10 Without being dishonorable, I wanted to know can I  
11 address the Court when you finish?

12 THE COURT: When we are done, yes, Mr. Mitchell.

13 DEFENDANT MITCHELL: Thank you.

14 MR. KURLAND: Your Honor, at the lunch break I  
15 was talking to the government with respect to some of  
16 the potential witnesses. I indicated to the  
17 government that we wanted Mr. Montgomery present, and  
18 the government politely, but certainly refused. I was  
19 wondering if the Court could order --

20 THE COURT: Why do you need Mr. Montgomery?

21 MR. KURLAND: Well, without going into too much  
22 of displaying what our, part of our defense is --

23 THE COURT: I'm sorry. This is on the  
24 eyewitness identification.

25 MR. KURLAND: The array of issues with respect

1 to the Andrea Smith identification.

2 From the moving papers that we filed years ago,  
3 it's clear that Ms. Smith has made several  
4 contemporaneous statements concerning the identity of  
5 the perpetrators right after the initial shooting. Of  
6 critical import, she describes a tall person, much  
7 taller than Mr. Gardner, wearing a red hat as the  
8 shooter. This has been testified to under oath by  
9 some of the police officers.

10 Mr. Montgomery, we have reason to believe that  
11 Mr. Montgomery has under oath to the government said  
12 that Mr. Holly was wearing a red hat. That is  
13 critical with respect to --

14 THE COURT: I'm sorry, Mr. Kurland. I'm not  
15 following this. We are talking about Mr. Gardner's  
16 motion to suppress photographic identification,  
17 correct?

18 MR. KURLAND: No.

19 THE COURT: No. Okay. What are we talking  
20 about?

21 MR. KURLAND: Andrea Smith made several  
22 statements to officers with respect to what happened  
23 at the scene. She also allegedly made a show-up  
24 identification.

25 THE COURT: Right. The show-up identification

1 of Mr. Gardner.

2 MR. KURLAND: Well, it's unclear as to what  
3 exactly. The government's position is going to be  
4 that she identified Mr. Gardner in the show-up as the  
5 shooter.

6 THE COURT: Okay. All right. Just stop there  
7 for a moment. So the government's contention,  
8 proffer, expected evidence is that she identified Mr.  
9 Gardner at the Spence murder --

10 MR. KURLAND: Yes.

11 THE COURT: -- as the shooter.

12 MR. KURLAND: Yes.

13 THE COURT: She has testified already in the  
14 state court proceeding.

15 MR. KURLAND: No. She never did testify.

16 THE COURT: She didn't testify.

17 MR. KURLAND: But she made a statement to a  
18 police officer who did testify under oath at both a  
19 preliminary hearing and at the state court trial that  
20 the shooter was a tall guy wearing a red hat.

21 THE COURT: Okay.

22 MR. KURLAND: Which is not --

23 THE COURT: She knew it was a tall guy wearing a  
24 red hat.

25 MR. KURLAND: Which is not Mr. Gardner.

1 THE COURT: What does that have to do with the  
2 identification evidence in this case?

3 MR. KURLAND: Well, because, because that isn't  
4 Mr. Gardner and --

5 THE COURT: Okay. So she might be a defense  
6 witness, but I'm trying to focus on what we need to do  
7 in the way of Mr. Gardner's motion to suppress  
8 identification evidence.

9 MR. KURLAND: If part of putting on that  
10 evidence --

11 THE COURT: Part of putting on what evidence?

12 MR. KURLAND: If part of putting on the evidence  
13 concerning the constitutional unreliability of the  
14 show-up procedures with respect to how Andrea Smith  
15 allegedly made an identification of Mr. Gardner, we  
16 have proffered evidence, and it's in the file from  
17 years ago, that Andrea Smith also made a statement at  
18 the scene where she described what happened and  
19 described the shooter as a taller guy, six foot three,  
20 six foot three, wearing a red hat.

21 THE COURT: Okay. So that will go to the  
22 reliability and thus, the admissibility of her  
23 out-of-court identification.

24 MR. KURLAND: Yes. In addition to that --

25 THE COURT: Go ahead.

1 MR. KURLAND: -- we had earlier heard today in  
2 graphic and flowing things that Mr. Montgomery has  
3 been self-described, or not self-described, as the  
4 wheelman with respect to that shooting.

5 The government's argument is, and it is their  
6 contention that Mr. Montgomery was present during, or  
7 at or around the time of that. Mr. Montgomery has  
8 testified that on that day --

9 THE COURT: In the state court proceeding?

10 MR. KURLAND: Well, in the Grand Jury.

11 THE COURT: In the Grand Jury. All right.

12 MR. KURLAND: That Mr. Holly that day, who is  
13 about six foot three, wore a red hat.

14 THE COURT: Okay.

15 MR. KURLAND: Again, without going all into what  
16 our defense is going to be with respect to that,  
17 that's critical evidence for the Court in evaluating  
18 the accuracy and the reliability, and all of the  
19 factors concerning the accuracy and the reliability of  
20 her alleged show-up identification.

21 THE COURT: Okay. I'm not going to order the  
22 government to produce Mr. Montgomery. I don't see the  
23 connection. In fact, you just told me that he  
24 testified in the Grand Jury that Mr. Holly was wearing  
25 a red hat.

1 MR. KURLAND: Oh, I'm sorry. I forgot one  
2 critical factor. Ms. Smith says at the scene that the  
3 guy wearing the red hat is the shooter. I'm sorry.

4 THE COURT: Okay. So she will be cross-examined  
5 on that and the Court will make a reliability  
6 determination.

7 MR. KURLAND: Well, the government has also told  
8 me that if I try to admit into evidence Mr.  
9 Montgomery's statement in the Grand Jury, they are  
10 going to object on hearsay grounds. How can they  
11 object on hearsay grounds if they are not going to  
12 present him?

13 THE COURT: Well, it's --

14 MR. KURLAND: Well, you have to make the ruling.

15 THE COURT: I can consider that on a motion to  
16 suppress identification. I mean we are not concerned  
17 about a jury at the hearing. So we don't need Mr.  
18 Montgomery is what I'm saying.

19 MR. KURLAND: Well, as long as that testimony  
20 with respect to Holly wearing the red hat is --

21 THE COURT: Well, I'll decide whether I'm going  
22 to consider it at the time of the hearing. I  
23 understand that, but we don't need him here to repeat  
24 that if you've got the Grand Jury testimony.

25 MR. KURLAND: All right. That's the first

1 thing. The second thing --

2 THE COURT: Let me just hear briefly from Mr.  
3 Harding, please, again. I know you have been over  
4 this.

5 Mr. Harding, are you going to introduce the  
6 evidence of the show-up?

7 MR. HARDING: Yes, Your Honor.

8 THE COURT: And through what witness?

9 MR. HARDING: I'm going to let Mr. Hanlon --

10 THE COURT: Mr. Hanlon, do you have a detective  
11 who is going to testify to that?

12 MR. HANLON: There were two. I believe they  
13 were uniformed officers.

14 THE COURT: Uniformed officers.

15 MR. HANLON: Then they will be prepared to  
16 testify about the procedure that was followed. One of  
17 the things Mr. Kurland and I spoke about this  
18 afternoon is Mr. Kurland has a couple of officers he  
19 is expecting to see at the hearing. I told him to  
20 give me a list. I want to make sure they are  
21 available and so forth.

22 THE COURT: Okay.

23 MR. HANLON: That's essentially how the  
24 government anticipates setting forth this procedure.

25 THE COURT: All right. Okay.



1 All right. Go ahead, Mr. Kurland.

2 MR. KURLAND: Two other things, Your Honor. One  
3 is that, Mr. Harding and I had talked about this over  
4 the phone, the earlier transcripts of several of the  
5 proceedings --

6 THE COURT: Right. I saw that in the papers.  
7 Have you been in touch with Ms. Cook?

8 MR. KURLAND: I personally have not, but we need  
9 the full, I think all counsel need the full  
10 transcript, not just simply the testimonial part.

11 THE COURT: I agree. I am sure if you are in  
12 touch with Ms. Cook, she will do whatever she needs to  
13 do to get them produced.

14 MR. HARDING: Mr. Kurland and I left a voice  
15 mail message for Ms. Cook.

16 THE COURT: Yeah. She has been ill, and as you  
17 can see, she is not here today. She has had some  
18 issues, but I am sure she will produce them for you.

19 MR. HARDING: She did call me back and she did  
20 agree to produce that stuff.

21 THE COURT: Sure. They will be available. They  
22 will be available.

23 MR. KURLAND: Your Honor, the other housekeeping  
24 matter is based on what happened this morning, I will  
25 get together with Mr. Harding to see if we can come up

1 with a proposal with respect to a schedule with  
2 respect to written pleadings on the co-conspirator  
3 issue that we talked about this morning.

4 THE COURT: You mean Montgomery?

5 MR. KURLAND: Yeah. Yes.

6 THE COURT: Well, I don't think we need much of  
7 a schedule. I mean just submit a motion. I mean I  
8 thought I heard pretty comprehensive argument this  
9 morning.

10 MR. KURLAND: Your Honor --

11 THE COURT: It appears to me, based on Mr.  
12 Harding's proffer, that prima facially, Mr. Montgomery  
13 is a member of the conspiracy at the time he has the  
14 conversation with Mr. Gardner.

15 Now it is true that for a co-conspirator  
16 exception to come into play, the recipient doesn't  
17 have to be a member of the conspiracy.

18 MR. KURLAND: That's true.

19 THE COURT: But there are certain statements  
20 made to a non-conspirator which fall outside the rule  
21 under circumstances where those same statements made  
22 to a member of the conspiracy clearly are encompassed  
23 by the rule.

24 Based on Mr. Harding's proffer of Mr.  
25 Montgomery's alleged membership in the conspiracy, and

1 the circumstances under which these alleged  
2 conversations occurred between Mr. Gardner and Mr.  
3 Montgomery, I would be prepared to conclude that Mr.  
4 Gardner's statements about Mr. Martin were indeed  
5 statements made in furtherance of the conspiracy, and  
6 during the conspiracy. That's not a final ruling.

7 MR. KURLAND: I understand.

8 THE COURT: But I don't think I need 27 pages of  
9 legal briefs on that. I think I need at most a couple  
10 of citations, and maybe Mr. Harding can reduce his  
11 proffer to writing so that you can better get your  
12 hands around it.

13 MR. KURLAND: Judge, here's my problem. The  
14 representations that Mr. Harding made today are  
15 substantially at variance with all of the evidence and  
16 discovery that I have, not just the Grand Jury  
17 testimony, but of the pages and pages and pages of the  
18 prior statements of Mr. Montgomery, including his  
19 under oath testimony and the full record in the state  
20 court case.

21 So if Mr. Harding is not going to submit  
22 anything, that's fine, but I then certainly want to  
23 file a very detailed counter-proffer that will support  
24 the position --

25 THE COURT: I absolutely invite you to do that.

1 In fact, that's probably the way we ought to go. You  
2 ought to make the first filing, and I will ask you to  
3 do it in two weeks, and Mr. Harding will have an  
4 opportunity to respond.

5 But Mr. Montgomery's own motion or belief or  
6 even his protestation about whether he was or was not  
7 a member of a particular conspiracy, as you all know,  
8 is not controlling.

9 MR. KURLAND: It's certainly not controlling.

10 THE COURT: Exactly.

11 MR. KURLAND: But neither is it irrelevant.

12 THE COURT: Mr. Harding clearly is correct, a  
13 person can be a member of a conspiracy and at the same  
14 time do some solo work or do some work for some other  
15 conspiracy.

16 MR. KURLAND: And vice versa. That's the thing.

17 THE COURT: What's the vice?

18 MR. KURLAND: That simply because somebody is a  
19 member of one conspiracy doesn't mean they can't be a  
20 member of another, and simply because they are a  
21 member of a conspiracy doesn't mean that everything  
22 they do is in furtherance of that conspiracy.

23 But rather than belabor the point now, Your  
24 Honor, I just wanted to get this clear. I will  
25 certainly be -- I have no problem with being the first

1 person to draft. I will say this, though, that the  
2 representations again made by the government today are  
3 substantially inconsistent with the under oath record.

4 So to the extent that Mr. Harding in his  
5 representations is relying on information or evidence  
6 that I don't have, I would like to see that because  
7 again, the status, and the nature and the  
8 circumstances surrounding that alleged conversation,  
9 and the motivations for the Darius Spence robbery,  
10 have been established under oath time and time and  
11 time again, and none of them comport with the  
12 representations that were made today.

13 THE COURT: Okay. All right.

14 MR. KURLAND: And I will lay it out, Your Honor.  
15 Thank you.

16 THE COURT: Okay. Very good. Thank you.

17 Mr. Harding.

18 MR. HARDING: Well, I think it's actually a good  
19 idea for the Court to consider some of this  
20 co-conspirator statement evidence pretrial because I  
21 do think there are some issues that the Court is going  
22 to have to decide, and it might be better to do it  
23 before trial rather than during trial, which is when  
24 motions like this are normally decided. But I don't  
25 see why it has to be done five and a half or six

1 months before trial.

2 I think that this is not a constitutional issue.  
3 This is simply an issue about whether or not evidence  
4 comes in under 801(d)(2)(E) and I think that the Court  
5 should allow this to be briefed in the weeks  
6 immediately before trial, not now.

7 THE COURT: I'm not going to do that. If Mr.  
8 Kurland wants to file a motion in two weeks or three  
9 weeks, he can do that and you can respond, and I will  
10 give you whatever time you need to respond, but let's  
11 get it worked out.

12 I'm not even sure, I mean I'm not sure why Mr.  
13 Kurland is so interested in this. Well, I think I  
14 know. It's Mr. Crowe who really is most interested in  
15 this.

16 MR. HARDING: Mr. Crowe is interested also.

17 THE COURT: All right. He is interested a lot  
18 more than Mr. Kurland because the statement is going  
19 to come in against Mr. Gardner no matter what. It is  
20 Mr. Martin who has the standing to challenge Mr.  
21 Gardner's hearsay statement. Mr. Gardner doesn't have  
22 standing to challenge a hearsay statement by Mr.  
23 Gardner.

24 MR. HARDING: Right.

25 THE COURT: Right? But Mr. Kurland, Mr. Kurland

1 is concerned about this and it seems to be related  
2 perhaps to the identification, and it clearly is  
3 related significantly to the specific Spence murder.

4 So you can file it. You can file it.

5 MR. KURLAND: Thank you.

6 THE COURT: You don't have to wait until August.

7 MR. HARDING: I would add, Your Honor, just by  
8 way of explanation that there is nothing about the  
9 Wyche brothers' murder or about Mr. Martin or Mr.  
10 Mitchell or Mr. Harris in the state court record that  
11 Mr. Kurland keeps referring to.

12 THE COURT: Okay.

13 MR. HARDING: Of course there isn't, because Mr.  
14 Gardner was tried for a single murder in Baltimore  
15 County. The state court prosecutor didn't even know  
16 about the Wyche brothers' murder until I told him  
17 about it. So there isn't going to be anything about  
18 any of that stuff in the transcript of the state case,  
19 the record of the state case.

20 Mr. Kurland's pleadings on this cited things  
21 like the statement of facts in Jermaine Johnson's plea  
22 agreement and some statement that Dean Stocksdale, the  
23 state prosecutor, made. They haven't got a clue about  
24 this Mitchell organization.

25 THE COURT: Okay. All right.

1 MR. HARDING: Okay.

2 THE COURT: All right.

3 MR. KURLAND: Your Honor, one brief --

4 THE COURT: No, Mr. Kurland.

5 MR. KURLAND: That was a bastion of  
6 misrepresentation. If the Court would give me a  
7 moment to correct one thing?

8 THE COURT: Go a head.

9 MR. KURLAND: This highly compromised key  
10 witness of the government, Mr. Montgomery, it has been  
11 said over and over again, including I think in  
12 statements to the U.S. Attorneys, that as part of his  
13 wonderful deal that Mr. Montgomery got, he was to tell  
14 them everything about everything, and there is no  
15 mention, and the connection to the government is, it  
16 has halfway convinced the Court today of this seamless  
17 connection between the Mitchell enterprise, robbery of  
18 Mr. A that morphs into the plan to rob Darius Spence,  
19 this seamless connection.

20 Mr. Montgomery was told over and over and over  
21 again that he had to be completely truthful and candid  
22 on every connection, and he fessed up to all sorts of  
23 other crimes that he got passes on.

24 And so for the government to stand up here and  
25 make it seem like I'm the idiot, a disingenuous idiot



1 to the Court by saying that, of course, he was only  
2 tried for one murder blatantly distorts the record  
3 which will be set forth in the pleadings.

4 THE COURT: I don't think Mr. Harding called you  
5 a disingenuous idiot.

6 MR. KURLAND: Not in so many words.

7 THE COURT: All right. May 10 and 11, we will  
8 do the identification. Then we have two days in June.

9 I haven't forgotten you, Mr. Mitchell.

10 Then we have two days in June.

11 What are we going to do in June, Mr. Harding,  
12 that you think we should or can?

13 MR. HARDING: Your Honor, could I address a  
14 letter to the Court and counsel on that?

15 THE COURT: That would be great. I am looking  
16 at your prior status report. We still have Mr.  
17 Mitchell's post-arrest statements issue?

18 MR. HARDING: Yes.

19 THE COURT: I haven't resolved that?

20 MR. HARDING: There would be a couple witnesses  
21 on that on May 10th, if that's all right with the  
22 Court.

23 THE COURT: Can you do that and the  
24 identification?

25 MR. HARDING: Oh, sure.

1 THE COURT: Okay. Then Mr. Harris's post-arrest  
2 statements.

3 MR. HARDING: Well, I don't have more witnesses  
4 on that.

5 THE COURT: Okay.

6 MR. HARDING: There are a number of pleadings  
7 relating to that, and I think it's ripe for decision  
8 on the papers, unless Mr. Martin and Mr. Treem  
9 disagree.

10 THE COURT: Okay. I may want some brief  
11 additional argument.

12 The death penalty motions are all submitted, I  
13 believe.

14 MR. HARDING: Oh, yeah. They have been  
15 submitted for some time.

16 THE COURT: Right.

17 MR. HARDING: And I think those can be decided  
18 on the papers.

19 THE COURT: On the papers, definitely.

20 MR. SULLIVAN: Your Honor, no. The notice to  
21 strike, they filed a new notice in January, which we  
22 haven't filed. We will get it in in the next two  
23 weeks or so. They added new aggravators. We have the  
24 right to move to strike those.

25 THE COURT: Of course.

1 MR. SULLIVAN: So those aren't ripe yet.

2 THE COURT: All right. So perhaps we will get  
3 to those in June or perhaps not until July.

4 All right. Now we need to get serious about the  
5 jury questionnaire. Mr. Kurland and Mr. Coburn, I  
6 guess preserving certain exceptions, signed off on it.  
7 I assume that all counsel have a copy or that a copy  
8 is readily available. So I would ask you to take a  
9 look at it and be prepared on May 11th to bring to the  
10 Court's attention any changes or modifications that  
11 need to be put in.

12 Obviously it's going to be expanded because now  
13 we are talking about all four defendants. So we need  
14 to massage that, but I would like to get it out by  
15 June 1st or certainly by June 15th. Okay?

16 All right. Anything else, anybody, other than  
17 Mr. Mitchell?

18 MR. COBURN: No, Your Honor.

19 THE COURT: All right. Mr. Mitchell, I'll hear  
20 you briefly, sir.

21 DEFENDANT MITCHELL: First of all, let me thank  
22 the Court for honoring me. I would like to state that  
23 I fully accept the government's offer for value. I  
24 fully accept Mr. Attorney, doing business as Timothy  
25 Sullivan, cross-examination of the said officer on

1 April 1st.

2 I would like to accept for value Mrs. Attorney  
3 doing business, motion to sever, trial and sentencing  
4 proceedings. I would like to return each and every  
5 offer for value for close and settlement of the  
6 account. I would like to state my five requests.

7 I do not argue the facts, request the Court to  
8 issue me an appearance bond, waive all public costs.  
9 I request the Court to close all the accounts and  
10 release order of the Court to me immediately. I  
11 request the Court to set off and adjust all public  
12 charges by the exemption, in accord with Uniform  
13 Commercial Code 3-419, House Joint Resolution 192,  
14 Public Law 73-10. I request immediate discharge, and  
15 I thank you.

16 THE COURT: All right. Mr. Mitchell, I am  
17 willing to permit you to make those statements at the  
18 beginning of each session and at the end of each  
19 session. But as you saw, to the extent that there is  
20 disruption during court proceedings, the defendants  
21 are going to be excluded from the courtroom.

22 So the way you did it here this afternoon is  
23 exactly the way the Court -- doesn't think it's  
24 appropriate, but the Court is willing to accede to  
25 your request to make that speech at the conclusion of

1 the proceedings.

2 All right. Thank you very much, counsel. I'll  
3 see you on May 10th.

4 (The proceedings concluded.)  
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REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of United States of America vs. Willie Mitchell, et al., Defendants, Criminal Action No. AMD-04-029, before the Honorable Andre M. Davis, United States District Judge, on April 26, 2007 is true and accurate.

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Gail A. Simpkins  
Official Court Reporter

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